POLICE POWERS — SEARCH AND SEIZURE IN CRIMINAL LAW ENFORCEMENT

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Law Reform Commission of Canada
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K1A 0L6

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Notice

This Working Paper represents an attempt to consolidate, rationalize and reform police powers of search and seizure in criminal law enforcement. The Commission seeks responses from all members of the judiciary, legal profession, legislative bodies and the public at large who would care to comment upon it. The Commission will be formulating its Report to Parliament at a later date, after having taken into account the public response to this Working Paper.

The Commission would be grateful, therefore, to receive comments addressed in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Canada
K1A 0L6

Commission

Francis C. Muldoon, Q.C., President
Réjean F. Paul, Q.C., Vice-President
Louise D. Lemelin, Q.C., Commissioner
Alan D. Reid, Commissioner
Joseph Maingot, Q.C., Commissioner

Secretary

Jean Côté, B.A., B.Ph., LL.B.

Coordinator, Criminal Procedure

Calvin A. Becker, B.A., LL.B., LL.M., Ph.D.

Principal Consultant

Lee S. Paikin, B.A., LL.B., LL.M.

Consultants and Contributors

Tanner Elton, B.A., LL.B., LL.M.
G. Norman Jones, B.A., M.A.
Sharon Moyer, B.A., M.A.
Louise Savage, B.A., M.A.
Clifford Shearing, B.Sc., M.A., Ph.D.

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The Commission is also grateful to the Canadian Association of Chiefs of Police and its Law Amendments Committee, and to the many federal, provincial and municipal police officers who, with patience and candour, submitted their search and seizure practices to outside scrutiny.

For their assistance in evaluating the legalities of search warrant issuance, the Commission is indebted to the members of the panel assembled by Mr. Justice Ducros: Mr. Justice Edward Bayda of the Court of Appeal of Saskatchewan; Associate Chief Justice James Hugessen of the Superior Court of Québec; Mr. Justice Benjamin Greenberg and Mr. Justice Jean-Guy Boilard of the Superior Court of Québec; Mr. Justice John O'Driscoll of the Supreme Court of Ontario; Mr. Justice Peter Richard of the Supreme Court of Nova Scotia; Mr. Justice Kenneth Fawcus, formerly of the Supreme Court of British Columbia; and Mr. Justice Benjamin Hewak of the Manitoba Court of Queen's Bench.

Preface

When the Commission first began its examination of police powers of search and seizure in 1978, the view was not infrequently encountered that the law of search and seizure could safely be left as it was.

To be sure, it was acknowledged that police practices might not always conform strictly to legal requirements, and that, occasionally at least, judicial officers responsible for the issuance of search warrants might exercise their discretion rather less judicially than their office required. For the most part, however, it was urged upon us that the law of search and seizure stood in no need of close scrutiny, much less fundamental reform.

As evidence for that proposition, we were invited to observe the relative dearth of case-law, both civil and criminal, generated by allegations of illegal search and seizure. On this evidence, of course, the problems of search and seizure were episodic rather than systematic: they were problems attributable to the powers' exercise in particular circumstances, rather than to the constitution of the powers themselves. And, of course, if this evidence were accepted as proof, then clearly there were more promising subjects for law reform than search and seizure.

For our part, we were inclined to suspect that the problems of search and seizure went beyond occasional non-compliance with an otherwise satisfactory legal regime. Our preliminary research had disclosed a confusing array of criminal search and seizure powers. When one added to that array the various search and seizure powers available for the investigation of other federal offences, to say nothing of the powers authorized by provincial legislation, the cumulative effect was truly bewildering. Surely, it seemed, there must be substantial uncertainty in the sheer force of numbers alone. Although the rule of law's imperative of certainty might be respected in each particular instance, an indiscriminate proliferation of search

and seizure powers would render the aggregate of such powers, for law enforcement personnel and public alike, virtually unascertainable and hence uncertain.

And, of course, to the uncertainty of numbers must be added the uncertainties of varying justifications and procedures. Even within the *Criminal Code* itself, search powers varied materially, with the legality of their exercise in particular cases contingent upon differing justifications and differing formal, substantive and probative criteria. In the face of this proliferation of highly variegated powers, there seemed every reason to attempt, at a minimum, a thorough consolidation and rationalization of the criminal law's powers of search and seizure.

Instead of proceeding directly to this task, however, we were anxious to ascertain whether the powers and discretions associated with the law of search and seizure represented any kind of problem in practice. Conceivably, the muddle that we perceived was, if not perfectly intelligible, at least manageable for experienced police and judicial officers.

The methods we used for examining search and seizure practices need not be described here. Suffice it to say that we closely examined the use of search warrants, writs of assistance and powers of search without warrant. Suffice it to say also that we found ample confirmation of our initial apprehension that legal constraints upon police powers of search and seizure were not being closely observed; and that a significant part of this disparity between law and practice was attributable to the complexity and incoherence of the legal regime by which the powers were governed.

Manifestly, not all the non-compliance we observed could be attributed to so excusable a factor. For the problem of a complex and incoherent legal regime, however, there was an obvious solution: consolidate and rationalize the various search and seizure powers found within the common law, the *Criminal Code*, and within such crime-related statutes as the *Narcotic Control Act* and the *Food and Drugs Act*. Ideally, then, all crime-related search and seizure would be governed by a single and comprehensive set of standards and procedures.

But what standards and what procedures? Briefly, we fixed upon a standard of reasonableness that put a premium upon judiciality and particularity. And, of course, from that standard can be derived the procedures. In selecting this standard of reasonableness as the benchmark for specifying the justifications and procedures for the

exercise of police powers of search and seizure, we have attended closely to the *Canadian Charter of Rights and Freedoms* and its enjoinder against unreasonable search or seizure. Indeed, it can fairly be asserted that our recommendations represent merely an elaboration of the standard of reasonableness that informs the right, prescribed in section 8 of the *Charter*, to be secure against unreasonable search or seizure.

In the result, our recommendations for reform were guided by three central precepts. First, the disparate array of search and seizure powers presently providing for criminal and crime-related investigations should be replaced by a single, comprehensive regime. Second, if search and seizure powers were meaningfully to comply with the *Canadian Charter of Rights and Freedoms*, the grounds for their exercise should, as a rule, be determined to be reasonable by a judicial officer, adjudicating before the event and upon particularly sworn information. Third, the exceptions to the rule that search shall be by warrant should be so circumscribed as to permit resort to powers of search without warrant only in circumstances of recognized exigency or informed consent.

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CHAPTER ONE

Introduction

1. The text of this Working Paper is divided into two parts. Part One is devoted to an analysis of present crime-related search and seizure laws, their history, and how they are put into practice. In Part Two, specific proposals are developed for reorganizing and changing certain aspects of these laws.

2. These matters are related, of course, particularly when one focuses on specific components of search and seizure procedure. For example, in order to make intelligent proposals respecting personal search, it is necessary to consider the present law, its historical background and the way it actually works. To immediately focus upon such specific components, however, is to risk missing the forest for the trees. One must first look at the larger picture: the problems and characteristics of the existing body of search and seizure law as a whole.

3. This is a complicated task; search and seizure laws are not easily organized into a manageable body. Indeed, it is difficult to think of another area in criminal procedure so characterized by bewildering distinctions and idiosyncrasies. Consider, for example, the array of search warrant provisions. In addition to section 443, which authorizes searches for items connected to offences generally, the *Criminal Code* contains specially focused provisions covering firearms, obscene publications, crime comics, things and persons in various disreputable houses, hate propaganda and precious metals.[1] Outside the *Criminal Code* itself, yet within areas associated with criminal law enforcement, one finds virtually identical regimes under the *Narcotic Control Act* and the *Food and Drugs Act*.[2] Aside from these crime-related warrants, there are nine other search warrants established under federal legislation.[3]

4. The complexity of the law does not stop at warrant provisions; the warrant is not even the major device for authorizing searches and seizures in contemporary legislation. It does predominate in the *Criminal Code* itself, although warrantless powers do exist with respect to weapons, illegally held timber, cocks in a cockpit, and counterfeit money. The diminished role of the warrant becomes evident, however, in other federal statutes. Altogether, it has been ascertained that eighty-two federal enactments, including again the *Narcotic Control Act* and the *Food and Drugs Act*,[4] confer upon designated officers powers to search without warrant. The search and seizure regimes under narcotics and drugs legislation are further complicated by the maintenance of special powers associated with the writ of assistance. In addition to these statutory powers, criminal law enforcement relies heavily on common law provisions for warrantless search incidental to arrest, and for searches permitted by "consent".

5. This assortment of powers is the product of a growth that has occurred in piecemeal fashion over the past 300 years. The tendency of legislators has been to enact a search power and append it to a particularized enactment when and where the need for one has been evident. Consequently, search and seizure powers have been regarded individually, as incidents of larger enactments, rather than collectively, as instances of a category of power. In this sense, the procedural rules governing search have followed the tradition of English criminal law; they have not developed so much as accumulated.

6. This pattern of growth has not been interrupted in Canada by any major attempt to analyse the laws of search and seizure as a whole. Perhaps the closest undertaking to such an endeavour occurred prior to the introduction of the 1892 *Criminal Code*. Yet it is arguable that this effort marked more of a consolidation of existing provisions than a critical rethinking of them. At any rate, it is fair to say that however unkempt the arrangement of rules may have been ninety years ago, it is far more so now. It is thus time to examine comprehensively the present array of crime-related search and seizure powers, and it is primarily to this task that Part One of this Working Paper is directed.

7. Part One relies upon three modes of analysis to depict the present situation: legal, historical and empirical. The legal perspective ("What is the law?") and the historical perspective ("How has it evolved to its present state?") are presented in Chapter Two. Simply on the basis of this presentation, it might be

possible to make certain assessments of the coherence and viability of the rules, and the trends that have characterized their evolution. The picture is not complete, however, until the empirical perspective ("How is the law put into practice?") is considered; indeed, without this perspective, conclusions as to coherence and viability are of limited use.

8. Before depicting the present situation, however, it is useful to understand the parameters of the study. What are "searches", "seizures", and "warrants"? The answers to these questions may appear obvious, but the fact is that the words are often used improperly. Writs of assistance, for example, have been frequently described as "warrants", whereas they are really nothing of the kind. Aside from serving the interests of precision, a definition of essential concepts affords basic criteria according to which existing and proposed laws may be measured. To know what these concepts signify is to take the first step toward evaluating the laws that deal with them.

I. Searches and Seizures

9. Neither "search" nor "seizure" is defined in our present *Criminal Code*. This may seem a curious omission, but an explanation is not hard to find. Quite simply, the *Criminal Code* and similar statutes regard these exercises not as *acts* but as *powers* — powers to engage in a variety of courses of conduct. These courses of conduct are set out not in legal definitions but rather in two complementary types of provisions: general rules regarding police conduct in the performance of duties, and specific rules which both authorize and regulate particular search and seizure activities. In performing a search for, and seizure of, a firearm, for example, a peace officer is limited both by section 25 of the *Criminal Code*, which allows for the reasonable use of force in the enforcement of the law, and by the special provisions of sections 99, 100 and 101, which describe when and how such searches may be made, what may be seized, and how seized items should be disposed of after seizure.

10. This approach may suffice to set out what may be done in pursuit of a search and seizure power; however, it does not serve to

distinguish or identify that power. One must, rather, attempt to locate search and seizure powers in a larger context, asking, "What is their significance? What do they do and why are they necessary?" In this Working Paper, we accept the following definition. **Search and seizure powers are powers to perform intrusions for the purpose of obtaining things, funds or pre-existing information.**

A. Searches and Seizures as Intrusions

11. Searches and seizures, if one takes wide and commonplace definitions of the terms, are actions that virtually everyone performs in everyday life: looking for things, acquiring control over them, and transporting them from one place to another. It is only when these actions involve an intrusion on the recognized rights of another individual, however, that the law ordinarily takes notice. As a general rule, it responds by condemning the intrusion as a crime or tort, and levying the appropriate sanctions.

12. At this primary stage of legal response to intrusion, there is no distinction between actions performed by police officers and those performed by other individuals. The distinction arises, rather, by way of specially created exceptions to the general prohibitory standards. As one commentator has pointed out:

> Now neither a police officer nor anybody else may, other things being equal, lawfully assault or imprison another person, enter his premises or seize his goods, because such conduct constitutes trespass to the person, to land and to goods. Indeed in the first case a criminal offence also is committed. For this reason the law has developed rules justifying arrest, entry and seizure in certain cases and these powers form exceptions to the more general laws of crime and tort.[5]

It is in this sense, then, that search and seizure laws confer powers. More particularly, they confer *exceptional* powers, powers to do what an individual is, in ordinary circumstances, forbidden to do.

13. The exact parameters of these powers are therefore of critical importance to the police. If a police officer acts outside them, even in the pursuit of legitimate objectives, he may be breaking the law,[6] and since an officer acting outside these powers has exceeded

his duties, the law will not afford him any special protection against those who obstruct his actions. In fact, the occupant of private premises who physically restrains an officer from searching them without valid authority is on the same legal footing as one obstructing any trespasser.[7]

14. The ambit of these exceptional powers is of equally grave concern to society as a whole. For the interests with which these powers conflict are among the most critical accorded to individuals in a liberal democracy: interests involving the inviolability and dignity of the person, the concept of privacy, the security of possessions and self-expression. Article 12 of the *Universal Declaration of Human Rights*, for example, prohibits "arbitrary interference" with an individual's "privacy, family, home or correspondence".[8] A specific application of this concern to those interferences entailed by searches and seizures may be perceived in section 8 of the *Canadian Charter of Rights and Freedoms*:

> Everyone has the right to be secure against unreasonable search and seizure.[9]

Because of the importance accorded to the individual interests at stake, it is critical that search and seizure laws be limited to the service of competing interests that truly justify the infringements entailed.

15. The threshold question in the elaboration of any scheme of intrusive powers of search and seizure is therefore: What competing interests should be allowed to justify intrusions upon such significant rights? Once this question is answered, secondary questions arise. What procedures can be instituted to authorize and monitor the intrusions? What constraints should be imposed on the persons who perform them?

16. Such questions, of course, may be posed in a context as wide as the spectrum of government intervention in human activity. In Canada today, intrusive searches and seizures are performed daily in the enforcement of schemes of economic regulation, health and safety legislation, and administrative procedures such as income tax rules, which all individuals are required to follow to one degree or another. A thorough analysis of the range of these intrusions is an important and considerable task.[10] The context of this paper, however, is limited. The intrusions it will discuss will be those pertaining to one particular role and function of the State, perhaps one of its most critical, and certainly one of its most historical: the enforcement of criminal law.

B. Search, Seizure and Arrest

17. Exercises of powers of search and seizure, along with those associated with arrest, constitute perhaps the most visible intrusions carried out in the enforcement of criminal law. Unlike other infringements on individual freedom, such as committal for trial or sentencing, these powers are likely to be exercised in the ordinary, everyday world: on streets, in homes, in workplaces and in vehicles. Occurring as they frequently do at the outset of the sequence of intrusions that run through the course of criminal procedure, a search, seizure, or arrest may mark the first significant contact between a suspect and a law enforcement officer. Moreover, the exercise of one power may well be a prelude to the exercise of another: a personal search may occur as an incident to arrest; an arrest may follow a seizure of incriminating evidence.

18. Because of the common characteristics and the frequent proximity of these exercises of police powers, the need arises to distinguish between them. The distinction accepted in this Working Paper is founded on the purpose of the two exercises. While arrest is a power directed towards asserting control over a person, search and seizure are directed primarily towards obtaining things, funds or information.

19. It may be thought that such a distinction is beside the point. After all, don't arrests and searches *look* different? Surprisingly enough, not necessarily; indeed, at the initial stage of intrusion, a search of premises for persons whom the police wish to arrest may be virtually indistinguishable in appearance from a search of premises for items that the police wish to seize. The premises are entered, perhaps by force, and the peace officers involved move through them trying to locate the person or thing that is the object of the investigation.[11]

20. Problems of distinction also arise where the intrusion takes place not on premises, but on the body of the person. In the *Scott* case, for example, the Federal Court of Appeal was presented with the following set of facts:

> The respondent was seated at a table with several others and had raised his glass and taken a gulp of beer when the appellant, Siddle, a sergeant of the R.C.M.P., who, with the appellant, Blaney, a constable of the same force, had arrived on the scene a moment or two earlier, seized the respondent by the throat, using his left hand for the purpose, and with his right hand seized the respondent's hair and pulled his head back so that his face was pointing generally towards the ceiling.[12]

What happened here? According to the trial judge, an arrest commenced with the application of the throat hold; he proceeded to find that this arrest was made without justification. The judges in the Court of Appeal, on the other hand, looked solely to the search and seizure powers under the *Narcotic Control Act* to justify the intrusion, Thurlow J. commenting that he was "unable to see on the evidence how what was done is to be regarded as an arrest".[13]

21. The point that emerges from such cases is that it is fruitless and misleading to attempt to characterize police actions as "arrests", "searches" or "seizures" on the basis of phenomenological characteristics. What is distinguishable on this basis is simply the nature of the intrusion: an assault upon the person, a trespass upon premises. The distinction between the various classifications of police powers may be properly appreciated only when it is recalled that the function of these powers is to except the police from the general rules relating to intrusions. The existence of these exceptions, in turn, depends on the presentation of a justification for them. The essential distinctions between exercises of powers of search, seizure and arrest lie not in the form of intrusion made, but rather in the justification for intrusion offered. In other words, in response to the question, "What interest or purpose is served by this particular intrusion?", the powers of search, seizure, and arrest present distinct answers.

22. The American Law Institute's definition of search in its *Model Code of Pre-Arraignment Procedure* runs in part:

> Any intrusion, other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance....[14]

This suggests that search is really a preliminary exercise, undertaken for the purpose of achieving the ultimate objective, a seizure; or, to be exact, the purpose of the search is to find something. Assuming that it is found, the purpose of the seizure then becomes relevant.

23. Seizure is defined in the *ALI Code* as follows:

> The taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority....[15]

To refer back to the sequence that begins with search, seizure represents the acquisition of control over what has been found. In this respect, seizure is analogous to an arrest. As one commentator has noted,

> Police "seize" human beings, as well as animate and inanimate objects.... The arrest of a person and the seizure of a thing are parallel activities which may or may not be incident to a search.[16]

The distinction between the purposes of seizure and arrest thus lies in the object of control: an inanimate object (which in our view encompasses things, funds and information)[17] in the former case, a person in the latter.

24. The exception to this general breakdown occurs when control over individual *A* is asserted in order to rescue him from confinement by individual *B*. While perhaps superficially resembling an arrest, such an exercise is distinct from an arrest in that its purpose is not the detention of individual *A*. Rather, the coercive element of the exercise is directed towards individual *B*, just as it would be if he were the custodian not of a person but of a thing sought. Accordingly, such rescues may be seen to have more in common with seizures than arrests. While this view prompts us to consider powers of rescue in the course of this Working Paper, we maintain that the interests of clarity demand that they be kept separate from powers of search and seizure.

25. Two further matters deserve clarification. First, in speaking of the object of control, it is important to be aware of the distinction between the purpose for which the power is exercised and the steps that may be necessary to achieve that purpose. For example, in order to conduct a search of a person it is necessary to assert control over that person for the duration of the search. This assertion of control might well satisfy the traditional test for arrest set out in the *Whitfield* case:[18] touching with a view to detention. Because of the instrumental character of such intrusions, however, they are not uncommonly perceived as a deprivation upon liberty that somehow falls short of qualifying as an arrest.

26. This problem has often been resolved in American jurisdictions by classifying the detention necessary to effect the search as a "stop". This term is also used by police forces in Canada to cover such activities as checks of automobile drivers for licences and insurance documents. A further semantic refinement — "freezing" the occupants of premises being searched for narcotics — was introduced into the vocabulary of search and seizure by *Levitz* v. *Ryan*.[19] It remains to be seen, however, whether in the light of the *Charter* these "stops" and "freezes" will qualify as arrests or detentions or be given a distinct juridical status. More generally, it remains to be seen whether, and to what degree, Canadian courts will modify the notion that the duties conferred upon peace officers imply

the powers necessary and incidental to their performance. For present purposes, however, we have not found it necessary to resolve these issues. Instead, we have attempted, wherever possible, to make explicit which instrumental intrusions are to be attached to particular powers of search and seizure.

27. Second, in distinguishing the purpose of a search from that of a seizure, it is not intended to suggest that separate justifications must always be offered at different stages of intrusion. Rather, the two stages often form a continuum; as was mentioned, the purpose of the search resides in the seizure that is expected will follow it. However, the *Colet* case,[20] recently decided by the Supreme Court of Canada, demonstrates judicial reluctance to infer the existence of a search power from the presence of a seizure power. Moreover, there are some circumstances in which an officer is entitled to seize objects of an incriminating nature, which he may not have anticipated finding at the outset of a search.[21] It is prudent, therefore, to be specific in discussing or formulating these powers. For present purposes, **we view search as the power to perform intrusions in order to find an object. We view seizure as the power to acquire that object.**

C. Search, Seizure and Surveillance

28. If the powers of search and seizure conferred upon police officers are justified generally by the State's interest in controlling or obtaining certain things or information, they are not the only practices exercised in the pursuit of such an interest. Rather, the pursuit of information, particularly in the modern world, may be undertaken by means of the distinct practice of surveillance.

29. The distinction between surveillance and search and seizure is not an altogether obvious one. Indeed, little analysis has been done in the way of articulating a definitional distinction. The distinction adopted in this paper is as follows. **While the purpose of search and seizure is to obtain or control things or information that pre-exist the exercise of the power, the purpose of surveillance is to obtain information that becomes perceivable in the course of its exercise.** This distinction may be understood through a discussion of both juridical and technological factors.

30. While it is now possible to think of search and seizure as information-gathering powers, originally they were regarded exclusively as means of obtaining things. The common law search warrant, as will be detailed later, was brought into existence solely to recover stolen goods from their unlawful possessor. While the ambit of items sought was gradually expanded by statute, it was not until comparatively recently that courts acknowledged a basis of seizure wider than a superior proprietary claim to the items in question. In *Entick* v. *Carrington*, a leading English case from 1765, the common law position was forthrightly stated: the State was not entitled to seize items for purely evidentiary reasons.[22] While this position was overturned in Canada by the 1892 codification, it remained vital both in the United States and in Great Britain for a good deal longer.[23]

31. The acquisition of things involves a distinct progression of events: entry is made into the area to be searched, the presence of the thing sought is ascertained, and the things found are appropriated. The possibility of prolonging the intrusion in order to observe subsequent occurrences has not been recognized as a valid aspect of search powers. Even after evidence gathering became acknowledged as a legitimate objective, courts interpreting search and seizure provisions were interested not in information as such, but rather in information that came from things. This position was maintained as recently as the 1947 decision in the *Bell Telephone* case, in which a warrant to search for and observe certain telephone apparatus was quashed. "[T]he fundamental thing", stated McRuer J., "is that the purpose of the search warrant is to secure things that will in themselves be relevant to a case to be proved, not to secure an opportunity of making observations in respect of the use of things, and thereby obtain evidence."[24]

32. Just as the "thing" to be seized was decidedly material in nature when search powers were conceived, so too the method of intrusion was envisaged as primarily physical. This physical orientation, which has remained basically unchanged to the present day, is reflected in the legal issues attending execution of searches and seizures: the question of whether entry into premises must be announced, the standards regarding use of force, and the procedures regarding detention of goods seized. In essence, the intrusion signified by making a search and seizure is one that calls attention to itself. Certainly this is the universal case in searches of the person, and while it is not unknown for premises to be searched in the absence of an occupant, empirical evidence suggests that such

incidents are the exception.[25] Even in such exceptional cases, the intrusion is likely to manifest itself in the form of traces of the search, the absence of things seized, or notices left for the occupant's information.

33. The visibility and physicality of the exercise correspond to the visibility and physicality of the interests protected by the precepts of Canadian criminal and tort law. These interests reflect an age when the greatest threats to individual security were perceived to be physical. It was in response to the tangible threats of what they identified as "the state of nature" that seventeenth- and eighteenth-century liberal theorists such as Hobbes and Locke developed a concept of the political state that would guarantee such physical rights as life, liberty and property.[26] Search and seizure laws in a sense responded to the physical aspect of this protection by authorizing certain physical exercises as exceptions to it.

34. The neatness of this interface between intrusion and protection, however, has been disrupted by the development of an information-gathering technology that is invisible by nature. In 1967, Alan Westin wrote:

> A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television and data line.[27]

The legal response to this development has been both extensive and diffuse. Primarily, the discussion has focused upon the need to develop new concepts of privacy to meet the technological threat to individuality.[28] In addition, however, the question has been raised as to how the exercises of technological information gathering fit together with the concepts of search and seizure.

35. In the *Berger* case, for example, the United States Supreme Court held that the use of electronic devices to capture conversations qualified as a "search" within the meaning of the Fourth Amendment to the American Constitution.[29] The motive of the Court, to impose constitutional safeguards on the use of a technology of which the framers of the American Constitution had no evident conception, was arguably laudable. Yet it is important to recognize that while technology has facilitated surveillance, it did not introduce surveillance; surveillance was possible long before electronic transmitters came into existence. Indeed, the primitive antecedent of

wiretapping, eavesdropping, was condemned by Blackstone as a nuisance at common law.[30] Although this activity involved, and indeed still involves, different logistics from that of electronic surveillance, the progression of steps in the exercise is identical: the entry is made, and then the observer waits for the occurrence that will provide the information being sought. In other words, while a search is designed to capture an object present at the point in time at which the entry is made, a surveillance is set up to capture or observe occurrences that take place after the entry is made.

36. Surveillance, then, is distinguished from search and seizure not by its technology, but by its chronology. Interestingly, the *ALI Code*, while adhering to the position that surveillance constitutes a category of search, recognizes this distinction:

> Surveillance searches do not seek things or information *in esse* at the time the search is commenced, but rather to observe an individual's continuing conduct and utterances in the expectation that the scrutiny will yield evidence or other information.[31]

From this distinction flow procedural demands. For example, the effectiveness of surveillance, unlike that of search, is likely to depend upon whether it is kept secret from the individuals concerned for a considerable period after entry.[32]

37. It should be noted that since this distinction is not founded on technological factors, it admits the possibility of sophisticated equipment being employed in a search and seizure. An obvious example would be the use of a camera to record the contents of private premises. The use of sophisticated technology, of course, renders it increasingly possible to carry out searches and seizures in less overt and even surreptitious fashion, a development that undermines certain protections inherent in the visibility of the traditional intrusions. The importance of these protections will be discussed later in this paper.[33]

II. Individual Interests Affected by Intrusion

38. Search and seizure powers conflict with four basic types of individual interests: security of the person, enjoyment of property

and related rights, expressions and communication, and informational privacy. In order to put search and seizure powers in perspective, it is useful to examine briefly the protections accorded these interests under law.

A. The Person

39. Security of the person is recognized as a distinct right in both the *Canadian Charter of Rights and Freedoms*[34] and the *Canadian Bill of Rights*.[35] Further recognition of the inviolability of the body has been codified in the civil jurisdiction of Québec.[36] The common law has also developed its special rules to protect the body. Primarily, this protection has been evident in the fields of tort and criminal law, in the definition of the causes of action and offences relating to intrusion upon the body: assault, battery and false imprisonment in the former case, and the various assaults causing bodily harm and the sexual offences in the latter. The variety of these legal protections and the seriousness of the consequences stemming from their violation indicate that security of the person is, under present Canadian law, guarded even more heavily than such associated interests as liberty and enjoyment of property.

40. The distinct protection that the law accords to the person has also been apparent in the specific case-law regarding the purported exercise of search powers. The *Ella Paint* case, in which an officer armed with a warrant to search premises was found guilty of assault for conducting a personal search of an occupant, is the leading Canadian case on this point. Harris J. of the Nova Scotia Supreme Court stated:

> In prosecuting his search the statute enables the constable to break doors, locks, closets, cupboards, etc. But nothing is said about searching the "persons" of the occupants. If it were contemplated to authorize so unusual a proceeding, one would expect the legislature to say so definitely and precisely; for, to search the person of the occupant is pushing farther the invasion of one's privacy than breaking open a door or closet.[37]

The common law, as disclosed in this passage, goes no further than requiring definite and precise authority for personal search; where that authority is conferred, the courts have acceded to it.

41. In fact, the power to search persons is widely, if inconsistently, spread among the relevant provisions in Canadian law. Among the crime-related warrant provisions examined in this paper, powers to search persons could be construed to exist under only four sections: sections 101[38] and 353 of the *Criminal Code*, section 10 of the *Narcotic Control Act*, and section 37 of the *Food and Drugs Act*. The restricted availability of powers of personal search in this context, however, is due less to a heightened respect for personal integrity on the part of Anglo-Canadian lawmakers than to the historical association of the warrant with searches of private dwellings. Indeed, the development over the last three centuries of the warrant, with its safeguards against unjustified entry into private domains, has been accompanied by the accrual of relatively discretionary warrantless powers to search persons.[39] The more traditional of these powers — searches of persons incidental to arrest or for dangerous weapons — have been carried from early English law into modern Canadian law in unbroken lines of descent.[40] To this core have been added new bases for intrusion, such as those currently afforded by narcotics and drugs legislation. When, along with these powers, the unfettered discretion to request a person's consent to a personal search is taken into account, it is evident that Canadian law gives peace officers wide latitude in invoking exceptions to the prohibitions against violations of the person.

42. But how far may a peace officer go in invoking these exceptions? Can all parts of the body be searched in order to find what the peace officer is looking for? In at least one instance, a Canadian court has given a negative answer to this question. In *Laporte* v. *Laganière J.S.P.*, the Québec Queen's Bench quashed a search warrant to extract bullets from a man's body. While Hugessen J.'s comments were directed specifically to the interpretation of section 443 of the *Criminal Code* and the common law power to search incidental to arrest, they also evinced a strong policy orientation:

> I am not the first judge, and I trust that I shall not be the last, to decide that the possibility that some guilty persons may escape the net of justice is not too high a price to pay for the right to live in freedom. If the Crown cannot prove its case against Laporte without doing physical violence to his person then it is better that the case be not proved.[41]

On the other hand, some intrusions into the body, particularly those probing exercises that do not puncture the skin, have been sanctioned by Canadian courts. A number of decisions, including *Scott*[42] and *Brezack*,[43] have upheld the right of peace officers to make searches of

the human mouth to find narcotics or drugs. And in *Reynen* v. *Antonenko*, it was held that a medical examination of the rectum, conducted by a doctor instructed by the police, is not an unlawful act if the force used is reasonable, proper and necessary.[44]

43. As well as arising in the context of traditional search and seizure powers, the sensitive issue of intrusions into the body for evidentiary purposes is relevant to the design of provisions covering the taking of blood and urine samples and other bodily substances. It is noteworthy that the right of an individual to decline to comply with such tests is recognized in the *Criminal Code*;[45] on the other hand, this right has not been translated into such procedural requirements upon the police as mandatory warnings or standardized requests for consent.[46] Although the performance of such tests may fit within the definitions of search and seizure developed earlier in this paper, we believe that the techniques involved deserve separate analysis. Accordingly, they will be considered in another Working Paper.[47] The present paper deals with investigative activities entailed in mouth searches, strip searches, and rectal and vaginal probes for concealed items.

44. Internal search activities prompt special apprehensions related to two major concerns — personal safety and human dignity. The former concern arises, for example, in cases of mouth searches, which may involve a dangerous "throat hold" technique. Before the Royal Commission into Metropolitan Toronto Police Practices, one officer professed the view that "in order to preserve evidence it was permissible to choke a suspect even to the point of risking his life".[48] That the advantages of obtaining evidence truly justify putting life in danger, however, was denied in the *Laporte* case and is indeed contradicted in subsection 25(3) of the *Criminal Code*, which tightly restricts police activity "likely to cause death or grievous bodily harm".

45. The latter concern, and the recognition that human dignity must on occasion outweigh the probing designs of science, has been articulated by Mayrand as follows:

> [TRANSLATION]
> Justice must refuse to collaborate with science when that would involve violating the sacred character of the person. As Rabelais said, "Science without conscience is the ruin of man".[49]

The concern is most relevant to search and seizure in the case of rectal or vaginal searches. Police instructions have made clear that such searches may only be conducted by an officer of the same sex as

the person concerned; they also direct that the officers require the suspect to expose the rectal-vaginal area rather than touch the suspect themselves.[50] However, it is obvious that such exercises involve serious infringements on the modesty and dignity of the individual. Indeed, such infringements begin not with the probing of the body but with the requirement that the individual subject himself to stripping and sexually intimate touching.

B. Property and Related Rights

46. In *Entick* v. *Carrington*, Lord Camden articulated the legal sanctification of property ownership that prevailed in his era:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.[51]

In the two centuries since Lord Camden's decision, the exceptions to the supremacy of private ownership have expanded considerably, to the point where the attitude itself is an anachronism. This was pointed out recently, in fact, by Salmon L.J. of the English Court of Appeal, who described Lord Camden's words as "both archaic and incongruous".[52] It is possible however, to abstract from its obsolete context the very legitimate concern at the root of the judgment — the protection of individual property from arbitrary intrusions by the State.[53]

47. Property has served a number of historical functions, two of which are particularly relevant to search and seizure powers. The first of these has been to protect the individual's rightful possessions from appropriation by others. The second, which is related to the emerging concept of privacy, has given him a spatial domain in which he is free to be left as alone as he wishes.

(1) *Possessions*

48. In effect, the law draws a line around the rightful possessions of an individual; if others attempt to appropriate them, he may seek redress through various legal avenues. In Québec, an individual's right to enjoyment of his possessions has been codified.[54]

In common law jurisdictions, the potential actions of trespass to chattels or conversion are open to him in tort. The criminal law recognizes various offences of mischief, theft and fraud.

49. It is within this protected zone that seizure, as opposed to search, generally has consequences. The consequences of the intrusion are concrete: the possessor is quite likely to lose the enjoyment and use of the thing seized for a lengthy period. When the avenues of appeal and the possibilities of second trials are taken into account, the inconvenience caused by seizure of possessions may become considerable. A recent example in point is the *Pink Triangle Press* case, in which business documents of a newspaper were held for over two years.[55]

50. The subordination of property interests to the demands of criminal law enforcement has been implicit in the expansion of search powers over the past few centuries. Where these demands are legitimate, the individual property-holder must suffer some deprivation. While at one time it was thought that some items, such as "private papers", ought to be immune from seizure altogether,[56] it is now generally recognized that any chattel can be seized so long as it is sufficiently related to an offence.[57] However, the individual's interest has been recognized in restraints upon the way in which the State is allowed to seize and detain such items. Primarily, these restraints come into play after the seizure has been made, in rules dealing with the disposition of things seized and their possible restoration to private possession. They are also relevant, however, in the context of the execution of the search; where the mode of authorization is a warrant, for example, there is a general limitation that only those items named on the warrant be seized.[58]

51. A person's possessions may be damaged as well as seized in the course of executing a search. Police officers acting under existing provisions of the *Narcotic Control Act*, for example, may break open doors, windows, containers and "any other thing".[59] Such damages represent a cost that the public, in the form of either individual losses or compensation for the injury to the individual, is required ultimately to bear.

(2) *Private Domains*

52. The second relevant function of property has been to give the individual a private domain. Within this domain, the individual is supreme; persons who intrude upon it contrary to his wishes may be

prosecuted civilly, and in some provinces, under statutory provisions, as trespassers.[60]

53. The notion of the spatial domain is intimately connected with a concept that has received a good deal of attention recently: the protection of privacy. Indeed, until lately, the deprivation of a property right was one of the two main bases upon which a claimant could assert a violation of his right to privacy.[61] What, then, is "privacy"? Conflicting definitions have been advanced by various commentators, and the theoretical problems are so acute that the best solution may well be to regard privacy as a "principle having a high order of generality", rather than attempting to formulate a specific rule.[62] The foundation of this principle, and the interest it champions, though, have been articulated quite simply:

> Ever since man's emergence as a social animal his right to be private has been one of his essential guarantees of liberty. In this sense he may be considered free to the precise extent that he is let alone in that inner core of his being which concerns only himself, to think and act unfettered by either legal restraint or private curiosity....[63]

In a sense, property has reified this right to be "left alone", by giving each person a spatial domain into which the outside world, including the State, cannot pass in the absence of exceptional authority.

54. For the purposes of search and seizure law, there are two basic categories of "domain" that belong to an individual — privately occupied places and vehicles. The law has differentiated between these categories; vehicles, while affording a certain measure of privacy and security to their occupants, have not been accorded the same degree of protection given to private premises. As the United States Supreme Court has observed, "the configuration, use and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property".[64] This distinction between vehicles and private premises is particularly relevant to the breadth of circumstances in which search should be permitted without warrant; accordingly, it is covered in detail in Chapter Six.[65]

55. Perhaps a more significant question is whether there is any valid distinction between the dwelling-house and other places in which individuals have legitimate expectations of privacy. Certainly, the notion that an individual's dwelling-house is his last place of refuge, a place where he can "retreat ... and there be free from unreasonable government intrusion"[66] has a strong emotional appeal. It underlies the classic declaration that "a man's home is his castle",

first made by Lord Cole in *Semayne's Case*[67] and treasured by decision-writers ever since. But while freedom from intrusion in the home remains, in the words of an American jurist, the "archetype of privacy protection",[68] the ambit of that protection has expanded to cover other domains as well. Indeed, Lord Cole's declaration has been cited in connection with such non-residential domains as offices.[69] The question thus arises whether other privately occupied places are perceived as appropriate for the same protection traditionally accorded to the home.[70]

56. Procedural distinctions certainly remain in the statutes. Both the rules for firearms searches under section 99 of the *Criminal Code* and those for narcotics and drugs require documentary authority for intrusions into dwelling-houses that is not required in the case of non-residential premises.[71] Distinctions are also reflected in common law rules, such as those covering the necessity of a demand to enter, which are stricter if the premises to be searched are a dwelling-house.[72] We take the view, however, that the existence of separate rules for residential and non-residential premises needs to be approached afresh. Searches of offices, for example, may involve as great an interference with expectations of privacy as searches of dwellings. While the residential or non-residential status of private premises may be relevant in certain circumstances, e.g., in terms of whether it is appropriate to authorize a search by night, this distinction no longer seems relevant as a "bright line" for protecting individual privacy interests against arbitrary intrusions.

57. With the proliferation of search powers over time, the inviolability of spatial domains, like that of personal possessions, has of course been subordinated to the interests of criminal law enforcement. It is in any event largely accepted that the interest of the individual in enjoying the degree of privacy and solitude he chooses for himself must give way to the legitimate needs of the police to obtain objects of search and seizure. And while this suspension of the individual's control of his domain remains a serious infringement, it is a more abstract deprivation than the losses an individual suffers in respect of his possessions. The individual affected loses nothing material, but rather his choice of who may occupy his domain. So too, unlike the intrusions upon possessions, which may be of long duration, the intrusion upon such domains effected by search is relatively brief.[73] Still, it is safe to say that the importance of the private domain has inspired more judicial comment than any other concern in the area of search and seizure law. To the extent that this domain affords a critical protection to the individual

in the maintenance of his privacy, this attitude is valid. Yet to the extent that the law has tended to concentrate on protecting the spatial domain to the detriment of other interests, the attitude may have been near-sighted. Is it sufficient to fortify the door to the domain, but leave the intruder unfettered as to what he may do once inside?

C. Expressions and Communications

58. An individual's expressions and communications are affected more by powers of surveillance than by those of search and seizure. This is because expressions and communications are dynamic phenomena, spanning and developing over intervals of time. Accordingly, it is the continuous intrusion of surveillance that is appropriate for obtaining or controlling the information they disclose. It is only when the expression or communication is recorded or summarized, so that it is preserved in a concrete form, that search and seizure powers become relevant.

59. As a general rule, records of expressions and communications are treated just like other possessions. While the reproduction of such records is covered by copyright law, the records themselves, in the form of papers, books, tapes and films, are essentially things that, like other chattels, may be the subject of actions of trespass and conversion in tort, or charges of theft and fraud in criminal law:

> Where civil servant [A] opens [B]'s mail and reads it, [B] will probably succeed in a suit for damages.... However, if [A] merely reads an open letter without touching it, [B]'s suit will fail because there has been no direct interference. It does not matter that [B]'s complaint is basically the same in both cases. [A] is liable in the first instance not for his assault on [B]'s privacy but for his interference with [B]'s chattels. This type of analysis would apply equally to such articles as diaries or personal financial records.[74]

60. Nor are such records specially protected from search and seizure; insofar as they provide relevant information, they are readily seizable with other evidence of an offence. This represents a departure from the common law tradition, according to which "private papers" were held to be particularly sacrosanct. An individual, it was believed, was entitled to select for himself the time and circumstances under which he would "share his secrets with others".[75] Quite simply, the fact that a record may disclose a secret about an individual is no longer a reason *not* to subject it to seizure.

On the contrary, if the secret bears an evidentiary connection to an offence, it may frequently provide the very justification for intrusion.

61. An exceptional instance in which communications are given special protection from seizure is the case in which a special interest or "privilege" is present. This subject, pertaining to items in the possession of solicitors and possibly the press, will be discussed later in this paper.[76]

D. Information

62. All of the individual interests discussed so far have embodied information; the search of his body or premises, and the examination of his possessions or communications, all reveal facts about the individual concerned. But there are other ways in which facts about an individual may be revealed other than by intrusions upon his own conventionally recognized rights. An individual may be observed from vantage points outside his private residence or workplace. Information about him is likely to be in the hands of acquaintances, private institutions and government agencies. Any of these groups may be requested to co-operate, or indeed be subjected to coercive intrusions by the police, in the course of an investigation of the individual concerned. Finally, the police investigation itself is a source of potential information, both to the individual himself, and to interest groups outside the police, such as the press.

63. The phenomenon of information-gathering has already been referred to in passing in connection with modern technological developments and the rise of surveillance.[77] Advances in the methods of reception and classification of information not only call into question the traditional physical concepts of individual protection, but they also raise the spectre of a society in which individuality is crushed because the person is thoroughly known and therefore subject to manipulation. The spectre of such a society, reminiscent of George Orwell's *Nineteen Eighty-Four*, has prompted serious and agonized discussion as to the legal measures that might be taken to prevent such a situation from developing.[78]

64. There is no general right to prevent others from acquiring information about oneself, even when the information relates to a protected interest. Data about an individual that pertain to activities

within his own private domain, for example, may be appropriated and used by another, so long as the domain itself is not violated physically.[79] However, there are two particular ways in which an individual may be protected from the acquisition of information about him from third parties. First, there may be a relationship between the individual and the third party that includes confidentiality as an integral element. This duty of confidentiality may arise from contract,[80] or it may arise from circumstances in which a reasonable man would perceive it.[81] Second, as in the case of government institutions, there may be a statutory duty of non-disclosure imposed upon a particular party in possession of information about members of the public.[82]

65. How does this affect the acquisition of information by the police? Except where the confidential information is "privileged", the duty of non-disclosure does not outweigh the legitimate law enforcement interest in obtaining it. If the information in an individual's diary is seizable in his own home, it would be illogical to prevent similar information from being obtained elsewhere. This proposition seems to be accepted in recent legislative initiatives regarding individual privacy. The federal *Privacy Act*, for example, recognizes that the duty of a government institution to withhold personal information about an individual must give way to both a warrant issued to obtain it, and the request of an investigative body.[83]

66. Insofar as the acquisition of the information represents an intrusion, it is becoming recognized that, quite aside from the fact that the search may involve interference with spatial domains and possessions, it should be subject to procedural safeguards. This was perceived, for example, by the Krever Commission in Ontario, which recommended that no employee of the provincial health insurance plan be permitted to release health information about an individual to any police force in the absence of a warrant to obtain the information.[84] In the private sector, it is common for institutions such as banks and private telephone companies to insist on legal authorization before releasing information about a client to the police. We believe that this recognition of the private nature of personal information represents a healthy trend, and attempt to give balanced recognition to this interest in the course of this paper.[85]

III. Modes of Authorizing Searches and Seizures

A. Warrants

(1) *The Warrant as Authority*

67. "In its primary sense", runs Sweet's definition, "a warrant is an authority."[86] More specifically, in the common law tradition, it is a document, issued by a designated official, that confers authority on its recipient. This authority, in the context of search and seizure powers, is the authority to perform intrusions for the purposes previously described: obtaining things, funds or pre-existing information.

68. The use of a warrant, of course, is not the only way in which intrusions may be authorized. The power to search and seize may be granted by legislation directly to a specified class of individuals, with the possible limitation that they only exercise that power once they have ascertained the existence of given circumstances.[87] Compared to models of direct conferment of authority, the warrant procedure adds an extra step to the process; it entrusts the decision to search and seize to a party other than the prospective executor of the power. While this two-step process may be seen today as a kind of control device, its origin resided not in a perceived need to control power, but rather to extend it.

69. The nature of the warrant as a conveyor of authority can be properly understood only if its history is taken into account. Basically, its emergence in England is tied to the ascendancy of a figure whose own significance in the evolving patterns of authority was critical, the justice of the peace. The justice, during the course of the sixteenth century, became "the workhorse of local government", fulfilling an assortment of administrative as well as law enforcement functions.[88] These functions eventually required him to assert his control over the contemporary policing organization, the local constabulary. This assertion was manifested in the adoption of the warrant.[89]

70. The warrant was basically an extension of the justice's authority, an extension necessitated by the impossibility of the justice's personal performance of all of his newly acquired duties:

> Travel in medieval England was hazardous and difficult even within the relatively small jurisdiction of the justices. Thus the warrant provided a

> means of limiting the necessity of such travel by the justices by giving instructions to the constable. The warrant incidentally served as evidence of authority beyond that of the symbolic staff or baton.[90]

As originally conceived, then, the warrant was a device that simultaneously enabled the justice to delegate responsibilities while maintaining control over their exercise. Moreover, it made the powers of the delegatee visible. As the justice's responsibilities grew, so did the use of the warrant.

71. What prompted the growth of the search warrant was the need to respond to complaints of stolen goods. Hale, in his *History of the Pleas of the Crown*, gave what was to become an influential account of the appropriate procedure to follow in such cases:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them....[91]

The identity of the participants in Hale's model is noteworthy: the applicant was a private citizen coming to the justice in order to obtain the service of the local law enforcement apparatus in the vindication of his complaint; the constable was the officer sent out by the justice when a response was appropriate. These roles have shifted fundamentally in the centuries since Hale's account. The police themselves have become the applicants for the warrant in almost all instances, although they themselves may be acting upon complaints from individuals.[92] So too, administrative control of police activities has shifted from the justice of the peace to other organizational structures — executive officers within the force answerable to Cabinet ministers, municipal councils and local administrative boards.[93] Both of these changes are traceable to the advent of the modern police force in the mid-eighteenth century, a phenomenon that it is safe to say Hale could not have imagined. How is it, then, that the procedure he envisaged is still basically intact, that the warrant still represents a grant of authority by the justice to the recipient to make a requested search and seizure?

72. Essentially, the nature of the authority conferred by the warrant has changed along with the social institutions involved in the procedures. When the justice grants a warrant to a police officer, it no longer represents the delegation of authority from an administrator so much as the authoritative decision of an adjudicator. Indeed, it is the

separation of the decision-making function of the justice from the executive duties of the officer that distinguishes the warrant according to modern case-law. As was stated in the 1965 Ontario case of *Worrall*:

> The police officer is not a judicial officer. It was not his function to decide whether the articles in question should be seized or not. It was the duty of the Justice, upon the evidence before him, to decide this question.[94]

Inherent in this separation of powers is the notion of control: the peace officer cannot perform the search and seizure until the justice, having assessed the officer's application, decides to authorize him to do so.

73. While this control has been emphasized in recent case-law, it is important to realize that its fundamental basis is traceable to Hale's model. Hale developed his warrant at a time when the common law was starting to flex its muscles, and he encountered antipathy from such champions as Coke towards the infringement upon property rights and abrogation of parliamentary sovereignty that the warrant was thought to represent.[95] Hale, too, though, was a sound common lawyer; while he was prepared to countenance the search warrant as a necessary device for the apprehension of felons, he was careful to invest it with features that would assuage some of the worst fears of uncontrolled state intrusion. These features, which have been emphasized in the case-law ever since, boil down to two essential characteristics: judiciality and particularity.

(2) *Judiciality*

74. According to Hale, the search warrants for stolen goods were "judicial acts" which had to be "granted upon examination of the fact".[96] This characteristic has been seized upon by numerous common law courts in the three centuries since Hale's treatise. Canadian decisions have consistently quashed search warrants issued in circumstances indicative of a failure by the issuing justice to act judicially. Perhaps the most definitive pronouncement on the judiciality of issuance proceedings, however, was that made by Dickson J. for the majority in the 1982 decision of the Supreme Court of Canada in the *MacIntyre* case: "The issuance of a search warrant is a judicial act on the part of the justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings."[97]

75. Whether or not this characterization accurately describes what actually occurs in the justice's office when he is requested to issue a warrant is, of course, a critical question. Evidence that suggests it does not will be discussed elsewhere in this paper.[98] What is relevant from a historical point of view is that this particular judicial function was, in fact, granted to an individual whose comprehensive mix of functions made him anything but the neutral, independent adjudicator that modern jurisprudence associates with judicial office:

> A Justice of the Peace might issue the warrant for arrest, conduct the search himself, effect the capture, examine the accused, and sans witnesses extract a confession by cajoling as friend and bullying as magistrate, commit him, and finally give damning evidence at trial.[99]

Although many of the justice's law enforcement responsibilities have diminished with the advent of the modern police force, he still retains vestiges of his executive functions in modern legislation. By virtue of section 2 of the *Criminal Code*, for example, the justice of the peace remains included within the definition of "peace officer".

76. How is it, then, that the jurisprudence since the days of Hale has articulated a consistent vision of the judiciality of search warrant procedures? It would seem that what the jurisprudence has done has been basically to separate the *function* from the *office*, viewing the former in isolation from the latter. The demands underlying the requirement of judiciality, in other words, come not from what the justice does, but from what the warrant does. As was stated in the *Pacific Press Ltd.* case:

> The search warrant is a tool in the administration of criminal law, allowing officers of the law to undertake the search of a man's house or other building with a view to discovering, amongst other things, evidence which might be used in the prosecution of a criminal offence. From time immemorial common law Courts have been zealous in protecting citizens from the unwarranted use of this extraordinary remedy.[100]

77. It is from its aversion to intrusions upon individual rights, then, that the common law has developed the concept of the warrant as a mechanism of control, or more exactly, of judicial control. The jurisprudence has invested in the warrant the representation that the existence of a justification for intrusion has been objectively and impartially determined. Moreover, like determinations of fact at trials and similar judicial proceedings, the decision to issue a warrant must be made upon information presented under oath. That the warrant

ought to represent a judicial determination is accepted in this paper; in the discussion of appropriate statutory procedures, this proposition will serve as both a yardstick and a goal.

(3) *Particularity*

78. The requirement that a warrant authorize a particularly identified intrusion complements the requirement that it be issued judicially. No matter how carefully the issuer acts in adjudicating the application for authorization to search and seize, it will be of little effect if the authorization gives the executor of the powers ample discretion as to when and how he will make his intrusions. Indeed, Canadian courts have refused to read judicial discretion into writ of assistance provisions, on the basis that the wide powers of execution given to the writ-holder make any exercise of discretion in issuing the writ inconsequential.[101] On the other hand, the specification of a place to be searched, items to be seized, and a relevant offence makes the issuer's role a meaningful one. Indeed, the judicial determination made by the issuer basically links these elements together. As Lerner J. observed in the *PSI Mind Development* case, the question is "whether there were sufficient details ... to satisfy the justice as a reasonable man that in the specified premises, there were the specified things that would be evidence of the [specified] offence".[102]

79. The common law's concern for particularity and the executive branch of government's desire for discretion have existed in a state of constant tension throughout the history of search and seizure powers. The choice of warrant procedures in effect represents a concession to the value of certainty and a preference for the defined intrusions associated with common law jurisprudence. A "general warrant to search in all suspected places is not good", Hale stated, "but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof".[103] This principle of particularity became enshrined in most search warrant legislation, with respect not only to the warrant itself, but also to the application for it. It is expressed today in requirements pertaining not merely to the place to be searched, but also to descriptions of the items to be seized and the offence under investigation. As with the standard of judiciality, that of particularity is accepted in this paper as an objective that warrant provisions ought to strive to meet.

B. Warrantless Powers

80. The exercise of warrantless powers is dependent solely on the status of the prospective intruder as a peace officer and his ascertainment of certain preconditions to the exercise of the power. One might say that this mode of authorization exchanges the benefits associated with the warrant for the greater flexibility that it accords to peace officers. It would be misleading to assert, however, that these powers are the product of any rational process of comparing the advantages of warrant or other documentary requirements against their disadvantages. Rather, warrantless powers, at least in origin, seem to have sprung up at common law and in statute quite independently from warranted powers.

81. A variety of reasons and premises have underlain the growth of different warrantless powers. In some cases, the absence of warrant protections has reflected distinctions in values. For example, warrant powers were traditionally associated with intrusions upon interests in private property, particularly residential premises.[104] By contrast, early warrantless powers were directed to intrusions upon the body of the person. Particularly when the body was that of a suspected criminal, it was accorded little protection against its search.[105] One may also relate certain warrantless powers to dangers perceived as inherent in the presence of firearms and in the distribution and possession of narcotics and drugs. In the case of "consent" searches, the distinct underlying premise has been that since the intrusive potential of a search and seizure activity is negated by the concurrence of the individual affected, no document need authorize the peace officer's actions.[106]

82. What is signified by the absence of warrant protections in these cases? In theory, removing the warrant from the process of authorization may not entail a reduction in the standards that protect the individual from unjustified intrusions. A statutory provision for warrantless search and seizure may set out the "reasonable grounds" necessary to commence the intrusion and describe the permitted scope of intrusion in terms virtually identical to those found in warrant provisions. Subsection 101(2) of the *Criminal Code*, for example, states a detailed series of tests applicable to warrantless searches for firearms, identical to the standards set out for searches with warrants in subsection 101(1), save for the concession that the search need not be authorized by warrant where resorting to the warrant procedure would be impracticable.

83. Nonetheless, it has long been recognized that allowing searches to proceed on a warrantless basis amounts to a diminution of legal control over the exercise of the search power. This point was made effectively by Mr. Justice Jackson of the United States Supreme Court discussing the Fourth Amendment to the American Constitution:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[107]

In permitting the adjudication as to the justifiability and scope of search to be made by the prospective searcher, the warrantless mode of authorization tolerates the possibilities of biases in decision-making that stem from an interest in the outcome of the decision. For this reason, we adopt later in this paper a position in favour of a warrant requirement unless circumstances exist to justify an exception to it.[108]

C. Writs of Assistance

84. Although writs of assistance are sometimes described as a "general" or "blanket" variety of search warrant,[109] they are really nothing of the kind. In essence, they are documents that identify their holders as members of a specific class of peace officers with special powers of warrantless search and seizure. In order to appreciate the character of the writ of assistance, it is necessary to go back to its origins, which lie outside crime-related legislation.

85. The writ actually began as a private equitable remedy used to recover land or chattels.[110] As an instrument of public-law enforcement, it dates back to English customs legislation of 1662, in which it was conceived as an instrument to help regularize and maintain the long-standing practice of searches for unlawfully imported goods by the Crown's customs officers.[111] The effects of the

writ in customs legislation were that it enabled these officers to identify themselves and to obtain assistance in carrying out their search activities. This latter function accounts for the instrument's name: at its inception, it was truly a writ of "assistance".[112]

86. There has always been a significant difference between the functions and characteristics of the writ and the traditional search warrant. Historically, the writ of assistance was essentially a communication in the name of the Sovereign, identifying the writ-holder as a person lawfully competent to exercise a statutory power of entry, search and seizure and to command the assistance of constables and other persons of potential use to him in the execution of his duties. As such, it began as a ministerial or executive instrument that "authorized", in the now obsolete sense of "vouching for", the holder's identity as an agent of the Crown.[113] Thus, the writ did not purport to confer powers of search upon its holder; rather, it sought to facilitate the exercise of discretionary powers that accrued to him by virtue of his status as a customs officer.

87. Although the writ was sealed in the Court of Exchequer, there was never anything judicial about the procedure by which it was issued. In fact, it was originally processed entirely by a court administrator, without even the cursory participation of a judge. While the choice of the Court of Exchequer as issuing authority thus may seem perplexing to a modern mind, it is probable that the Court, with its established jurisdiction over the collection of revenue and impressive calligraphic facilities, was the most appropriate institution of its time to perform this task.[114]

88. Another distinction between writs of assistance and warrant procedures concerns the powers conferred upon the writ-holder. Under the prototypical customs legislation, the conduct of the search for contraband remained entirely within the writ-holder's discretion. He was in fact under no statutory obligation, either before or after the event, to justify his entry onto private domains against any standard of reasonable or probable cause, to confine his search to any particular premises, or to restrict seizures to items identified before commencing the intrusion. Mere suspicion would have sufficed in law as a reason for undertaking the most sweeping search activities.[115]

89. This kind of sweeping discretion has been the focus of bitter conflicts in common law jurisdictions. Confrontations occurred in eighteenth-century England, for example, in connection with the broad warrants used in efforts to muzzle the press. The general

reaction of the English courts was to brand such warrants as "oppressive", "nameless", and "worse than the Spanish Inquisition",[116] and invalidate them in the absence of express statutory authority. The great historical conflict over so-called "general" warrants, however, occurred in pre-revolutionary America, culminating in *Paxton's Case*, in which the Superior Court of Massachusetts, ignoring the example of certain sister courts, agreed to issue the unpopular "Writ of Assistants", thus triggering a series of protests that were to lead to the struggle that became the American Revolution.[117]

90. In this conflict, Canada has been somewhat ambivalent in its position. While maintaining standards of particularity in the cases of statutory warrants fashioned in the Hale tradition, our lawmakers have accommodated themselves to the use of the writ of assistance in the enforcement of customs, excise, narcotic and drug legislation.[118] Consequently, Canadian judges have been able to invalidate search warrants for "vague and generalized" descriptions of the search to be performed,[119] while constrained reluctantly to accede to requests for the far more generalized writ. This double standard has distinct implications — the co-existence of writ and warrant powers in narcotics and drugs regimes undermines the protection that warrant requirements are supposed to secure.

91. Although its juridical character remains similar, a number of modifications have been worked into the writ of assistance in its present Canadian adaptations in the *Narcotic Control Act* and the *Food and Drugs Act*. These modifications have at least partly obscured the original character of the writ. For example, while the writ of 1662 was directed to the persons who would be confronted by the customs officer, commanding them to aid and assist the bearer of the writ, the modern instrument is addressed to the bearer himself. Insofar as this creates the impression that the writ itself is authorizing the bearer to perform individual searches and seizures, it distorts the document's original character. In fact, however, possession of the writ has become relevant in defining its holder's search and seizure powers in a more general sense. This is evident in two modifications from early models. First, narcotics and drugs writs cannot be delegated from one peace officer to another as could early customs writs (and indeed existing writs under the *Excise Act*).[120] Rather, the narcotics and drugs writs confer powers only on "the person named therein", invariably a member of the Royal Canadian Mounted Police. Second, the peace officer with a writ has a power of search and seizure that his writless counterpart lacks — the discretion to

enter a dwelling-house to search for narcotics or drugs without a warrant.

92. Another superficial change is that writs under the *Narcotic Control Act* and the *Food and Drugs Act* are now issued by judges of the Federal Court of Canada. The role of the issuer, however, has remained essentially clerical, giving formal effect to a ministerial decision. As Jackett P. noted with some asperity in *Re Writs of Assistance*,

> [I]f I am right in my construction of the legislation, when a person holding a Writ of Assistance is exercising the powers conferred upon him thereby, he is exercising powers conferred upon him by statute pursuant to designation by the Attorney General of Canada or the Minister of National Health and Welfare, as the case may be, and is not executing an order or judgment of the Exchequer Court of Canada, or a judge thereof. Parliament, in its wisdom, has ordained that the authority conferred upon such officer shall be evidenced in the form of a writ issuing out of the Exchequer Court of Canada and the Court must bow to such statutory direction.[121]

93. Of a more substantive impact are the "reasonableness" restrictions introduced into the exercise of Canadian narcotics and drugs writs. While the writs themselves indicate that the bearer may conduct searches "at any time", the use of the writs is governed by subsections 10(1) of the *Narcotic Control Act* and 37(1) of the *Food and Drugs Act*. Like an officer exercising other warrantless powers of search under these provisions, a writ-holder is required to refer to requirements of reasonable belief that there are narcotics present. Moreover, as a matter of practice, R.C.M.P. officers using writs are required by force guidelines to file *ex post facto* reports justifying each incident of writ usage. However, these latter guidelines represent administrative policies and do not have the force of law.

94. The rationale for retaining the writ of assistance has little to do with its historical functions. In contemporary Canadian practice, the writ may still offer some signification of the holder's authority to perform searches and seizures, but it hardly serves as a device for authenticating a federal officer's identity to a local official. More significantly, its "assistance" function is obsolete. Peace officers from the R.C.M.P. do not use the instrument to obtain the help of their municipal or provincial counterparts. In fact, modern conditions reverse the "assistance" relationship; under some administrative arrangements R.C.M.P. writ-holders have been available to municipal officers who wish to utilize their special writ powers in searches orchestrated at the local level.[122] One R.C.M.P. officer who

fulfilled such a role has described himself as a "walking search warrant".[123]

95. The writ's contemporary rationale, then, is primarily as a mode of authorization that permits an expeditious response to the exigencies perceived to inhere in the enforcement of narcotics and drugs legislation. In a 1978 press release, Ron Basford, then Minister of Justice, referred to "the covert nature and ease of transportation and disposal of illicit drugs" which, he argued, "requires extraordinary measures".[124] Writs of assistance basically serve to designate a class of peace officers exclusively empowered to carry out these measures.

IV. The Constitutional Framework

96. There are two aspects of Canadian constitutional law that bear upon our approach to the law of search and seizure: (1) the limitations upon federal jurisdiction; and (2) the *Canadian Charter of Rights and Freedoms*.

A. Federal Jurisdiction

97. In accordance with the Law Reform Commission of Canada's mandate, the scope of the Working Paper is circumscribed by considerations of federal constitutional jurisdiction. For the most part, this limitation does not inhibit the development of either the analysis or the proposals advanced in this paper. Under subsection 91(27) of the *Constitution Act, 1867*, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within

> [t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

This classification clearly embraces the main subject-matter of this document: search and seizure provisions designed to enforce the

criminal law. All but one of the existing statutory regimes studied in this paper are found in the *Criminal Code*; the new set of rules proposed in Part Two are envisaged as an element in a code of criminal procedure.

98. The one area studied in the present document that is currently outside the parameters of the *Criminal Code* is that of narcotics and drugs legislation. We recognize that in the *Hauser* case, the majority of the Supreme Court of Canada held that the *Narcotic Control Act* was validly enacted by the Parliament of Canada under its general residual power rather than the specific criminal law power set out in subsection 91(27).[125] Without questioning the soundness of the majority decision, however, we consider search and seizure powers pertaining to narcotics and drugs investigations to be sufficiently "crime related" to justify inclusion in the present paper. This position is based on the recognition that like search and seizure powers under the *Criminal Code*, certain *Narcotic Control Act* and *Food and Drugs Act* powers are: (1) exercised by the police (2) as a responsive measure (3) to offences prosecutable in proceedings set out in the *Criminal Code*, including those by way of indictment.[126] Given these attributes, the question of whether or not narcotics and drugs legislation is "criminal law" for constitutional purposes is only peripherally relevant to our purposes. The central issue, rather, is whether there is any justification for treating *Narcotic Control Act* and *Food and Drugs Act* searches any differently than searches in relation to *Criminal Code* offences. In any event, it should be emphasized that the *Hauser* case does not remove narcotics and drugs procedures from federal jurisdiction. Rather it asserts federal jurisdiction over these procedures on a separate, more general basis than that of subsection 91(27).

99. The limitation of the scope of the present paper to federal matters does bear significance in one respect — the consideration of regulatory provincial statutes relevant to practices of criminal law enforcement. Of particular interest are liquor control and highway traffic provisions empowering peace officers to carry out search and seizure activities, most often of motor vehicles.[127] These provisions have been designed ostensibly to serve the purposes of the surrounding legislation. In practice, they enable peace officers to conduct checks related to far more general law enforcement objects.[128] While it may be artificial to expect peace officers to put aside their training and instincts as criminal law enforcers when performing activities mandated by provincial statutes, it is important to recognize the range of possibilities open to them due to these

additional sources of authority. Since the reform of provincial statutes is beyond the scope of this paper, however, we can only urge the provincial jurisdictions to evaluate the construction and use of the search and seizure powers they have enacted. Problems related to police powers of search and seizure cannot be fully addressed by proposals restricted to federal legislation.

B. The *Canadian Charter of Rights and Freedoms*

100. Section 8 of the *Canadian Charter of Rights and Freedoms* reads:

> Everyone has the right to be secure against unreasonable search or seizure.

Any analysis of the significance of this provision is largely speculative since at the time of writing, the *Charter* had not yet been judicially interpreted. There are two aspects of this provision that bear consideration at this juncture, however: (1) the ways in which the constitutional "reasonableness" test could be applied by Canadian courts, and (2) the particular consequences that might be entailed in warranted and warrantless intrusions.[129]

(1) *Application of the "Reasonableness" Standard*

101. Constitutional protection against "unreasonable search and seizure" seems to entail the possibility of judicial application of reasonableness tests at two distinct levels. First, it may permit courts to limit or declare inoperative legislation that departs from the reasonableness standard. Second, it contemplates the granting of remedies for individual police actions of an unreasonable nature.

102. Whether it is proper for courts to invalidate or limit the operation of legislation offensive to their interpretations of constitutional standards is an issue that has been contested in both political and academic forums.[130] However, there is little likelihood that Canadian courts will refrain from assuming this role in cases they deem appropriate. From the earliest days of Confederation, the Supreme Court has demonstrated a willingness to apply the *British North America Act* to invalidate legislation beyond the competence of the level of government enacting it. The exercise of this judicial role has been "tacitly assumed by everyone to be proper".[131] Subject

to the possibility of legislation being enacted under cover of a "notwithstanding" clause permitted by section 33, the *Canadian Charter of Rights and Freedoms* statutorily defines a core group of entrenched rights and hence contemplates the possibility of legislation beyond the competence of any level of government in Canada. If and when a statutory scheme is found to be within this area of forbidden legislation, the court making the adjudication could be expected to assume the power to declare it invalid.

103. The Canadian experience with the *Canadian Bill of Rights* also bears upon the possible approach of the courts to search and seizure legislation. Since the *Drybones* case, the Supreme Court has theoretically reserved two powers for itself: to construe narrowly potentially offensive legislation that can be brought within the borders of the enunciated restraints, and to render inoperative legislation that cannot be so construed.[132] The tendency of the Court, however, has been to affirm these powers while refraining from exercising them on the facts of particular cases.

104. This reluctance has rested, at least in part, on the non-constitutional status of the *Bill of Rights*.[133] The *Canadian Charter of Rights and Freedoms*, on the other hand, is an integral part of the Constitution, governed by subsection 52(1) of the *Constitution Act*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Quite simply, the entrenchment of individual freedoms in the *Charter* invites the Court to view the matter from the other side of the fence: as a judicial body entrusted with truly constitutional prohibitions against laws offending individual rights and freedoms.

105. Some preliminary guidance as to the possible consequences in this respect may be afforded by American case-law. The Fourth Amendment to the American Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the second clause in this provision, which defines the standards applicable to warrants, is not reproduced in any form in section 8 of the *Charter*, the wording of the first clause, guaranteeing

the right "to be secure ... against unreasonable searches and seizures", is quite resonant with the Canadian section. The series of American cases that have interpreted the first clause include a number of decisions in which the constitutionality of legislation has been challenged on the basis of its failure to meet the "reasonableness" standard.

106. A case on point is *Ybarra* v. *Illinois*, in which the United States Supreme Court dealt with the application of a state provision allowing searches of persons found in places being searched pursuant to a search warrant. The Court held that where a personal search was not itself founded on probable cause relating to the individual searched, it violated the protection of the Fourth Amendment against unreasonable intrusions.[134] In essence, the Court narrowly confined the legislation to make it conform to the Fourth Amendment. Where the impugned legislation is so offensive as to make such narrow construction impossible, the Supreme Court has invalidated it. In *Payton* v. *New York*, for example, the same Court recently invalidated legislation providing for warrantless entries into premises to effect arrests on the basis that such intrusions are "presumptively unreasonable".[135]

107. Insofar as remedies for individual police actions are concerned, much will depend upon the procedures available to an individual wishing to challenge or complain about search or seizure activity that has prejudiced him. The question of such procedures is discussed later in this paper.[136] For immediate purposes, it is sufficient to recognize that the constitutional security invoked by section 8 of the *Canadian Charter of Rights and Freedoms* is likely to be construed not only as a limitation on legislation but as a basis upon which to seek redress for individual police actions of an "unreasonable" nature.

108. To some extent, this prospect amounts to an enhancement of existing legal protections. The standard of reasonableness informs most statutory and common law sources of authority for warrantless search and seizure. For example, in such aspects of executing a search as the use of force, announcement prior to entry and "freezing" the premises searched, peace officers generally have been confined to actions that are reasonable under the circumstances.[137] In Anglo-Canadian law, the standard of "reasonableness" has served as a basic norm for the approach to police actions; in the words of Lord Devlin, "The police are expected to act reasonably and so long as they do, the accused is ... unlikely to insist upon his right to immunity from search".[138]

109. On the other hand, the institution of the constitutional provision does raise the possibility of the application of the reasonableness standard to areas of police activity from which it heretofore has been absent. In some cases, this absence has been due to specific statutory provision; subsection 10(4) of the *Narcotic Control Act*, for example, apparently has given peace officers a *carte blanche* to break apart doors, windows, floors, fixtures, compartments and other objects, unrestrained by considerations of reasonableness. If and when the operation of such provisions is found to be limited by the constitutional standard, the rights of individuals to obtain remedies in particular cases may be altered as well.

(2) *Warranted and Warrantless Searches and Seizures*

110. Section 8 of the *Canadian Charter of Rights and Freedoms* deals with searches and seizures in general. It does not distinguish between, or separately advert to, warrants or warrantless modes of authorization. This approach may be contrasted with that manifest in the Fourth Amendment to the American Constitution, in which a special set of criteria are applied to searches with warrant: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation". The absence of such a clause from the Canadian section has two distinct implications.

111. First, it raises the possibility that as a constitutional matter, Canadian courts will not show the preference for warrants that has characterized American law. Although the general prohibition of "unreasonable" searches in the Fourth Amendment is distinct from the subsequent elaboration of standards applicable to warrants, many American courts, reading the Amendment as a whole, have connected the "reasonableness" standard with the protection of warrant requirements:

> [t]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[139]

While it is not inconceivable that a similar policy of preference for the warrant could be accepted by Canadian courts, this policy would have to be advanced in the absence of supportive wording in section 8 of the *Charter*.

112. Second, it may leave a gap between a basic constitutional standard applicable to search warrants and a more elaborate set of requirements otherwise imposed by law. The "judiciality" feature of warrant procedures may be seen to be implicit in the constitutional "reasonableness" standard; Canadian case-law has discussed the "reasonableness" of the grounds of belief set out in the warrant in terms of the issuer's "judicial" performance of his duties.[140] On the other hand, the link between the reasonableness standard and the formal requirements that have developed in Canadian law is less obvious. It is conceivable that a search conducted with a formally defective warrant, yet supported by an information containing reasonable grounds for belief, could be considered at the same time to be both reasonable and yet unauthorized by law.

(3) *Conclusion*

113. Section 8 of the *Canadian Charter of Rights and Freedoms* informs many aspects of this paper. The standard of "reasonableness" will be kept in mind in assessing both the present laws of warrantless search and seizure and, insofar as it can be captured accurately, the picture of actual police practice in the area. The constitutional provision is also a foundation upon which any reforms in the law must be built. Accordingly, in Part Two of this paper, it is a constant referent in the development of the approaches, justifications and procedures for a new regime of search and seizure.

CHAPTER TWO

The Present Situation

114. The growth of search and seizure powers in Canada has been primarily a statutory one. While this country has continued to recognize many of the common law traditions it absorbed from England, it has relied since Confederation upon legislation for the development of new powers. This is a product of a correspondence between parliamentary initiative and judicial reticence. For the most part, because of the history of abundant statutory development in Canada, there has not been a need for courts to develop expanded common law powers of search. Moreover, even when confronted with a gap in statutory coverage, Canadian courts have been reluctant to develop new search powers to address problem situations.[141]

115. This Canadian approach has differed greatly from that of English courts, which, confronted with gaps in statutory coverage (including the absence of any comprehensive power to search for evidence of crime), have expanded the common law powers in order to meet the demands of the police. The most profound step in this expansion, the 1970 decision in *Ghani* v. *Jones*, in effect developed a general common law power of search for "serious offences", restricted by a range of qualifications pertaining to such factors as the identity of the items sought and the suspected involvement of the person affected by the intrusion.[142] The state of continued improvisation to which English courts have been driven as a result has led to considerable uncertainty and criticism,[143] and the Royal Commission on Criminal Procedure has recently recommended that powers of entry and search of premises be placed on a statutory basis.[144] In having a primarily statutory set of rules to rely upon, Canadian law has at least escaped some of the problems that have appeared in England.

I. Common Law

116. Two major crime-related categories of searches or seizures are still recognized at common law. They are the powers of search and seizure incidental to arrest and the provision for search on consent. In addition, it is relevant to examine the power of entry to prevent danger to life or safety.

A. Arrest

(1) *History*

117. The power of peace officers to search a person as an incident of his arrest is often assumed to be traceable to the earliest days of common law jurisprudence; one finds references in cases to its "undoubted" status at common law.[145] In fact, the *practice* of such searches clearly predated the existence of any specific authority for them, and it may fairly be said that these searches seem to have been simply assumed over the course of time to be proper and valid. This is due in large part to the historical tolerance of intrusive and indeed violent acts towards persons accused of crimes. Moreover, the objects of seizure associated with arrest, such as bags of coins and weapons, could usually have been found without prolonged examination of the person.[146]

118. That powers to search persons could be implied from the fact of arrest is evident in the English legislation enacted in the early eighteenth century. For example, a constable apprehending a suspected carrier of stolen goods was empowered to convey such goods to a justice of the peace;[147] the power to search for the goods was not express, but obviously would be necessary to discovering goods that were in any way concealed. Although it might be thought that the right to search an arrested individual under such vague authority would be contested in court, no reported cases on point appeared until the nineteenth century. In fact, the first cases of prisoners complaining of police search and seizure activities focused not upon the legality of the search activity, but rather upon the extent of the seizure carried out by the police. For example, in the *O'Donnell* case,[148] the court criticized the police practice of depriving

prisoners of money found on their persons which was not connected with any property allegedly stolen. The legality of the search conducted to find the money, however, does not appear to have been contested.

119. The major step in the recognition of personal search incidental to arrest as an intrusion deserving of legal regulation occurred in 1853, with the influential decision in *Bessell* v. *Wilson*.[149] Lord Campbell C.J., at the conclusion of a trial for wrongful imprisonment, made some *obiter* remarks in which he strongly criticized the manner in which the police had searched the plaintiff upon arrest. Such a search, stated Lord Campbell, required circumstantial justification, and such justification was not presented by the case at bar, in which the plaintiff was a tradesman, the occasion for the arrest was a copyright complaint, and there was little foundation for the argument that the plaintiff might have been concealing a weapon. This approach was picked up in *Leigh* v. *Cole*, an action for assault against a police superintendent who had allegedly apprehended, beaten and searched the plaintiff. In instructing the jury as to the legality of the search, Williams J. stated:

> With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reasons of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case.[150]

120. Over time, the articulation of the rule regarding the power to search prisoners has fluctuated somewhat. The traditional American rule, as set out in the *Corpus Juris*, phrases the power in general terms:

> After making an arrest an officer has the right to search the prisoner, removing his clothing if necessary, and take from his person, and hold for the disposition of the trial court any property which he in good faith believes to be connected with the offense charged, or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.[151]

This statement has been accepted as authoritative in some Canadian cases.[152] On the other hand, the more limited rule in *Leigh* v. *Cole* is also cited by Canadian courts. In fact, the distinction between the two positions has been largely theoretical; no modern reported

Canadian case has found the search of an arrested person to be an "unreasonable" precaution.

(2) *Arrest and Custody*

121. There are a number of issues that arise under the present law governing search of arrested persons. First, there is a definitional problem. At what stage or stages of the process of arresting an individual and keeping him in custody does the power of search apply? The rule in *Leigh* v. *Cole* speaks of search of the "prisoner". In a number of Canadian cases, the court has referred to the traditional case-law to validate searches performed in police stations and custodial institutions. At the other extreme are cases in which the relevant search occurs virtually at the moment of initial contact between the peace officer and the person concerned. In the *Brezack* case, for example, one finds the following description of a search for drugs:

> Acting on the information they had, the constables, as appellant approached the Golden Grill, left their place of concealment and, with two other constables, rushed upon him. One of them seized appellant by the arms, and Constable Macauley caught him by the throat, to prevent him swallowing anything he might have in his mouth.... Constable Macauley persistently tried to insert his finger in appellant's mouth, to recover the drug that he assumed was there, and each time he tried appellant bit his finger. A good deal of force was applied by the constables and Constable Macauley at last succeeded in getting his fingers in appellant's mouth, and satisfied himself that there was no drug there.[153]

In practice, peace officers may perform searches of a person at both points in time: the first to facilitate the initial arrest itself, the second to protect both the detained person and the custodial institution in which he is held.

122. To some extent this problem too may seem an academic one, since Canadian courts have been manifestly reluctant to distinguish between "custodial arrest" and other forms of arrest.[154] According to this view, once an accused is arrested, he is in custody. It is misleading, however, to merge investigative searches following arrest with searches of prisoners designed to preserve the order of penitentiaries, prisons and other custodial institutions. In the *Federal Penitentiary Service Regulations*, for example, there is a provision for searches of inmates, members and visitors by institution personnel.[155] This provision is concerned not with the immediate

response to crime characteristic of police powers but with safeguarding the institution in which the inmate is imprisoned. The searches of concern to the present paper are limited to those carried out by the police in the close aftermath of the arrest of an alleged offender.

(3) *Scope of Search and Seizure*

123. The exact parameters of the powers of search and seizure incidental to an arrest are defined somewhat sketchily in Canada. As far as the scope of search is concerned, it appears incontrovertible that the body of the person may be searched. Exactly how intimate or forceful that search may be is determined by "what is reasonable and proper in ... all the circumstances of the case".[156] In fact, few reported Canadian decisions have invalidated actions taken by police officers in this regard. The case of *McDonald and Hunter* is an example of an exception to the rule; it was held that two police officers who arrested a partially paralysed war veteran and threw him to the floor in an attempt to seize property on his person had used unnecessary force in their actions.[157]

124. The power of search incidental to arrest is generally conceded to extend to areas within the control of the accused. According to the *Report of the Canadian Committee on Corrections*,

> [w]here a person has been arrested, either with or without a warrant, the right of search extends not only to the person of the accused, but to premises under his control. In modern times the right to search premises, no doubt, also extends to a vehicle or other means of conveyance under the control of the accused.[158]

Canadian case-law on this point is actually quite sparse,[159] and a number of issues remain unresolved. Are the premises "under the control" of the accused confined to immediate surrounding areas? Are they even limited to the residence or other unit in which he is found? Some English authority has taken an expansive view of the power,[160] but given that the English courts have expanded the powers of search incidental to arrest at least in part to compensate for the lack of a generally applicable crime-related warrant, it might be questioned whether these decisions are applicable to the Canadian context.

125. The question of scope also arises in establishing the range of items that an arresting officer may seize. As was indicated above, early English case-law established the principle that money

unconnected with the offence charged could not be seized from a prisoner.[161] In Canadian law, this principle has been extended to constrain the police from seizing other items found on the prisoner in relation to which the State can show no legitimate interest. Accordingly, in the *McDonald and Hunter* case, it was found that the accused officers had no right to take an arrested person's war button from him against his will.[162]

B. Consent

126. The common law tolerance of search with consent is founded on different premises than the other existing powers of search and seizure. While the other powers establish exceptions to general prohibitive rules against intrusive conduct, and justify these exceptions on the basis of criminal law enforcement interests, the theory of "consent" search is founded on the proposition that the "search" performed does not in fact constitute an actionable intrusion. This proposition is an aspect of the common law doctrine of *volenti non fit injuria*:

> One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.[163]

According to this theory, once an individual consents to police action, he in effect waives the right to invoke the normal legal protections against the intrusions inherent in such actions. In effect, the giving of consent has been treated as a private transaction between individuals, thus rendering irrelevant such public law issues as the sufficiency of the peace officer's grounds for acting and the adherence to procedural prerequisites to intrusion.[164]

127. It is noteworthy that, judging by available decisions, few cases of "consent" search appear to be litigated. This may be attributable to a number of factors, including the traditional absence of an exclusionary principle in Canadian evidence law, the possibility that in the presence of consent police activity may be less injurious than in its absence, and the improbability of the individual challenging the legality of the actions of peace officers to whom he previously has given his consent. The search cases, such as *Reynen* v. *Antonenko*,[165] in which the issue of co-operation was raised, often contain little analysis on point beyond the simple conclusion as to

whether the individual did or did not co-operate with the police. As a result, the law of "consent" search must be inferred from the law of consent generally. In some aspects this is unfortunate, since a number of issues are cast in a new context by virtue of the fact of a police investigation. These issues include the notions of true, limited and informed consent, the problem of proving consent, and perhaps foremost, the question of consent by a party other than the suspect himself. While these issues have been litigated extensively in American case-law on the Fourth Amendment, they have hardly been touched in Canadian search and seizure law.

128. This is not to say that there are no guidelines with which Canadian peace officers may resolve these issues in practice. Some police forces have established their own procedures to guide officers wishing to perform "consent" searches, particularly of premises. Some divisions of the R.C.M.P., for example, have instructed officers to use documentary consent forms, which both potentially alert the individual to his right to refuse consent, and provide evidence of consent if the issue is raised after the fact. The discretionary basis upon which police forces have adopted such practices, however, points out the wide gaps in existing Canadian law.

C. Entry to Prevent Danger to Life or Safety

129. In its Report, the Canadian Committee on Corrections stated:

> We think that a police officer presently has the right to enter premises, including a dwelling house, by force if necessary, without a warrant, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he believes on reasonable and probable grounds that any such offence is about to be committed.[166]

This power appears to be related to the broader historical role of the peace officer as a keeper of the peace, a role that finds expression today in sections 29 and 30 of the *Criminal Code*. Although certain preventive aspects of this peacekeeping role fall outside the ambit of criminal law enforcement (and hence outside this paper), the role does touch on suppression of violent criminal breaches of the peace such as assaults. The occurrence of such breaches, encompassed by

the historical term "affrays", has been viewed in Anglo-Canadian law as sufficiently urgent to justify immediate police entry onto private premises. While to some extent this power of entry has been associated with eventual arrest of the "affrayer", it is not the prospect of arrest that justifies the entry; rather, it is the preservation of the peace itself.[167] In a recent Canadian case, the power was phrased in investigative terms: two police officers were afforded a defence to a trespass action on the basis that they were "investigating a complaint" relating to a "possible breach of the peace".[168]

130. Since this power could permit the peace officer to enter premises without a warrant to rescue persons unlawfully detained, it might be considered to constitute in part a warrantless search and seizure power. It might also appear to entitle entry onto premises to disarm persons possessing a firearm in dangerous circumstances. However, the vagueness of the power has made it an unreliable basis of authority in the eyes of the police. It was partly in response to such uncertainty that the warrantless weapons search provisions of subsection 101(2) of the *Criminal Code* were introduced. A recent report on gun-control legislation prepared for the Solicitor General concludes:

> Peace officers have often conducted search and seizure without a warrant in situations of perceived danger. But, reliance had to be placed on the common law which was, at times, somewhat unclear as to the authority of such acts. The section [101(2)] removes any ambiguity about the legality of such acts.[169]

The presence of subsection 101(2) appears to have eliminated resort to the common law power for this purpose.

II. Statutory Powers

131. The pattern of the growth of statutory search and seizure powers can be traced to English enactments of statutory search powers, passed in the first days of the Restoration. With the movement to parliamentary sovereignty, the resort to the common law to expand these powers had been cut off.[170] Indeed, with the demise of the Star Chamber in 1641 and the emasculation of royal proclamations, the primary expression of all sovereign powers had

come to reside in legislation.[171] Confronted with a problem demanding the assertion of these powers, the tendency of Parliament was to address it with a comprehensive scheme, of which the power to search was an integral, yet incidental part.[172] As more and more social problems demanded and received parliamentary attention, enforcement structures in general, and powers of search and seizure in particular, began to multiply.

132. In the context of criminal law enforcement, the significant impetus for legislative response came during the dramatic urban crime wave of the eighteenth century. By 1718, London had become lamented as a "receptacle for a Den of Thieves and Robbers and all sorts of villainous Persons and Practices".[173] As crime persisted over the next century and a half, the English Parliament replied with a rash of legislation notable, for our purposes, for its introduction of the first generation of crime-related statutory warrants: provisions covering larceny, counterfeiting, vagrancy, explosives and firearms, gaming- and bawdy-houses, and possession of stolen goods. As will be detailed momentarily, many of these provisions were imported into colonial legislation. On the eve of Confederation, the Province of Canada possessed an amalgam of search and seizure powers as diverse, for the most part, as that of its English parent.[174] It was only after the movement for reform in Britain had culminated in the drafts of the Criminal Code Bill Commission in 1880, that Canada took a significant step: the implementation of its own consolidated *Criminal Code* in 1892.

133. In the context of search and seizure powers, this development introduced the sweeping provisions of what has since become section 443 of the *Criminal Code*. These warrant provisions not only embraced all property relating to criminal offences; they also expanded the classifications of seizable objects to include evidence of an offence, and things intended to be used for offensive purposes. The 1892 codification did not collapse all warrant provisions into one. A number of special warrants were retained and indeed others were subsequently introduced to deal with the particular problems of narcotics and drugs, and with the distribution of offensive publications. The creation of this virtually universal warrant provision, though, had the effect of laying a comprehensive foundation for authorizing crime-related searches when and where they became necessary. As a result, the Canadian experience since 1893 has differed markedly from that of the British, who have persisted in the course of restricting warrant provisions to specifically aimed legislation.[175]

134. While the section 443 warrant is thus something of a historical late comer, it is by virtue of its comprehensiveness the logical starting point for an exposition of present statutory provisions.

A. Section 443 and Other General Provisions

135. Subsection 443(1) of the *Criminal Code* reads:

> A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

136. The origin of this provision has already been noted.[176] In the years since its introduction, it has come to epitomize, through judicial interpretation, the features of judiciality and particularity that we identify as essential to the warrant. The "judiciality" aspect is concentrated primarily in the "reasonable ground to believe" that must be expressed in the information; reviewing courts have in effect predicated the justice's "judicial" performance upon the ascertainment of such grounds.[177] The "particularity" requirement pertains to the elements that are requisite to the process: the thing sought, the offence to which it relates, and the "building, receptacle or place" to be searched. The detail with which these elements must be specified, merely implicit in the section itself, has been outlined at great length in the case-law; the list of things sought, for example, is required to be described so as not to leave the peace officers who execute the warrant with any discretion as to what to seize.[178]

137. While the primary authority for the execution of the search is the warrant itself, there are several statutory rules worth mentioning. As subsection 443(1) indicates, the warrant may be executed by either a peace officer or another "person named therein". This evident inclusion of members of the public marks an expansion of the common law rule, according to which the justice was constrained to issue warrants to constables, although private complainants could accompany the officer in order to help identify the stolen property. However, case-law has confined powers of private execution by precluding a private applicant from executing a warrant issued on his own information.[179]

138. Section 444 states that the warrant "shall be executed by day, unless the justice, by the warrant, authorizes execution of it at night". This actually represents a modification of the common law position that prohibited nocturnal searches, both for their "great disturbance" and the apprehension that under the cloak of darkness robberies could masquerade as searches with warrant.[180] Still, the preference for daytime searches remains. There is, on the other hand, no statutory mention of a deadline for making the search after the warrant has been issued, although there have been hints in the jurisprudence that the justice issuing the warrant may limit the date for execution.[181]

139. Finally, there is the matter of what may be seized. Section 445 reads:

> Every person who executes a warrant issued under section 443 may seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence, and carry it before the justice who issued the warrant or some other justice for the same territorial division, to be dealt with in accordance with section 446.

This is a feature peculiar to the section 443 warrant; it was introduced into the *Criminal Code* in the 1953-54 revision, despite some concern expressed in parliamentary committee that it violated the principle of particularity inherent in the warrant for the "common sense" purpose of avoiding duplicative issuance procedures.[182] In addition to this general provision for additional seizures, the execution of a section 443 warrant triggers the operation of section 447, which provides for seizure and disposition of explosives intended to be used for unlawful purposes.

140. One legal issue that has been raised consistently in connection with section 443 is its application to statutes other than

the *Criminal Code*. It is clearly inapplicable to offences created by a provincial enactment in the absence of specific provisions to the contrary by the provincial legislature.[183] A measure of disagreement has arisen, however, over its applicability to other federal statutes through the operation of subsection 27(2) of the *Interpretation Act*.[184] Although strong arguments may be made for a position restricting the operation of section 443 to the *Criminal Code* itself, the prevailing view at this time would appear to be that section 443 may be used to enforce another statute unless the other statute provides otherwise, either expressly or by implication.[185] For the purpose of this paper, this issue has significance for its impact upon narcotic and drug searches. In the *Goodbaum* case, it was held that since the *Narcotic Control Act* contained its own code of search, seizure and forfeiture, the provisions of section 443 were excluded by implication.[186] Consequently, the narcotic and drug search and seizure provisions discussed below are not, unlike the other special warrants, alternatives to proceeding under section 443. Rather, their existence has at least theoretically precluded resort to section 443 in response to the commission of narcotic and drug offences.

B. Gaming- and Bawdy-House Provisions

(1) *Subsection 181(1)*

141. Subsection 181(1) of the *Criminal Code* provides that:

> A justice who receives from a peace officer a report in writing that he has reasonable ground to believe and does believe that an offence under section 185, 186, 187, 189, 190 or 193 is being committed at any place within the jurisdiction of the justice may issue a warrant under his hand authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 185, 186, 187, 189, 190 or 193, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before him or before another justice having jurisdiction, to be dealt with according to law.

The offences encompassed by this subsection relate to the use of a common gaming- or betting-house (section 185), betting, pool-selling and bookmaking (section 186), placing bets on behalf of others (section 187), lotteries and games of chance (sections 189 and 190),

and the use of a common bawdy-house (section 193). Things seized under the subsection may be declared forfeited under subsection 181(3) after the expiration of thirty days or when they are no longer required as evidence.

142. This warrant is traceable to a number of measures instituted in the mid-eighteenth century to deal with the "wandering poor" and regulate activities thought to inspire criminal tendencies. As Leon Radzinowicz points out in *A History of English Criminal Law*: "In some ill-defined way, idleness, drunkenness or immorality came to be regarded as immediate causes of crime and therefore in themselves direct threats to stability".[187] The search warrants included in these measures were thus enforcement mechanisms for provisions that were seen not as defining serious criminal activity, but rather as preventing serious criminal activity. The legislative strands that run from these early warrants into the present section 181 are quite complex. It is possible nevertheless to discern quite readily how this bewildering history has given rise to the two major idiosyncrasies of the present warrant: the authority to seize persons found on the premises searched, and the use of the "report in writing".

143. The seizure of persons was actually the focus of the earliest warrants of this genre. Poor-law legislation of 1744 and 1752 referred to sweeping searches with warrant for idle and disorderly "rogues and vagabonds".[188] These were essentially arrest warrants; persons rounded up in the search were brought before justices and examined as to their means of livelihood. The 1752 legislation also included arrest warrants for the keepers of bawdy- and gaming-houses. The association of idle, disorderly persons with these locales was eventually exported to Canada where it was carried right into post-Confederation legislation.[189] As time progressed, this legislation expanded to include seizures of gaming equipment and evidence of the relevant offences.[190]

144. The existence of arrest and search powers in the same provision may seem curious. The true anomaly of the provision, however, is that the seizure of persons is no longer simply a custodial exercise. An 1854 increment to English gaming legislation enabled justices to submit the "found-in" to a compulsory examination on oath, thus giving the seizure an investigative aspect.[191] This aspect is retained in present section 183, which reads, in part:

> (1) A justice before whom a person is taken pursuant to a warrant issued under section 181 ... may require that person to be examined on oath and to give evidence with respect to

(*a*) the purpose for which the place referred to in the warrant is or has been used, kept or occupied, and

(*b*) any matter relating to the execution of the warrant.[192]

145. The "report in writing" procedure originated in 1839 English police legislation. The original provision was extremely complex, reflecting the tensions between the recently created Metropolitan Police Force and the justices of the peace. Basically, the scheme internalized the application procedure within the Force. After receiving a report from a superintendent as to the existence of a gaming-house, the police commissioners were empowered to issue an order in writing permitting a search of the premises. Some formal power, however, was ceded to the justices; appended to the report were compulsory complaints upon oath, sworn by informant-citizens before a regular local magistrate.[193]

146. If this purely formal role for the justice seems to represent an obvious departure from the "judicial" aspect of warrant procedure, it must be observed that the procedure at this time involved no actual warrant. Rather, it was essentially a two-way communication up and down the police chain of command: the "report" to the superior, the "order" to the inferior. The word "warrant" did not enter the section until long after it had been transplanted to Canada; it first appeared in the 1953-54 revision of the *Criminal Code*. By this time, the justice of the peace had come to play a decision-making, rather than on oath-administering, role in the process. In fact, the citizens' oath requirement had been eliminated in England in 1845, before the scheme ever crossed the Atlantic.[194] With the elimination of the police hierarchy from the authorization procedure, the transformation was virtually complete: the section contemplated a simple relationship between peace officer as applicant, and justice as issuer. The only amendment remaining to bring the scheme in line with a true warrant model was to replace the "report" with an information, yet this amendment was never made.[195]

147. The applicant for a section 181 warrant need not present the actual reasonable grounds for his belief in the written application. He must only report that he "has reasonable ground to believe and does believe". The requirement for any degree of factual assertion in the application vanished with the citizens' complaint under oath in the early English revisions. It is worth noting that the case-law has attempted to remedy these omissions somewhat. In the *Royal Canadian Legion* case, it was held that the proper exercise of judicial discretion required the justice to inquire into the basis of the

reporter's belief that grounds existed for the issuance of the warrant.[196]

(2) *Subsection 181(2)*

148. Subsection 181(2) of the *Criminal Code* reads:

> A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

Like the powers of search with warrant in subsection 181(1), this provision feeds into the forfeiture provisions of subsection 181(3).

149. Subsection 181(2), by its own wording, applies "whether or not" a peace officer is acting under a warrant. However, its powers add little to the warrant. Since it confers no express power of "search", subsection 181(2) cannot be said to authorize warrantless entry onto suspected premises; it merely gives certain discretion to officers otherwise present, whether by warrant or invitation. The particulars of this discretion are largely congruent with the provisions of subsection 181(1). There is little significance to the specific power to seize the person "found keeping" the premises in subsection 181(2); insofar as the keeper could be expected to be found on the premises anyway, he could be seized under subsection 181(1) as a found-in. And while the seizure of "evidence" under subsection 181(2) is not restricted expressly to items found therein, case-law has narrowed the significance of this distinction. In the *Chew* case, it was held that subsection 181(1) only permitted seizures of evidence concurrent in time with the committed offence:

> What this subsection clearly contemplates, in my view, is the type of situation in which a raid is made upon gaming premises, and it empowers the police in such a situation to arrest keepers and found-ins and to seize, with or without a search warrant, anything which might go to show that a relevant offence is being committed at the time the arrests and seizures are made.[197]

(3) *Women in Bawdy-Houses*

150. Subsection 182(1) of the *Criminal Code* reads:[198]

> A justice who is satisfied by information upon oath that there is reasonable ground to believe that a female person has been enticed to or

is concealed in a co[illegible] bawdy-house may issue a warrant under his hand authorizing a pea[illegible]officer or other person named therein to enter and search the place, by day or night, and requiring her and the keeper of the place to be brought before him or another justice having jurisdiction to be kept in custody or released as he considers proper.

151. This provision dates back to the English sexual offences legislation of 1885. Although common prostitutes had long since been liable to seizure under anti-vagrancy laws, this warrant legislation was ostensibly protective rather than condemnatory in nature. It reflected what had become by the late nineteenth century a growing concern with the sexual exploitation of young girls, particularly those from the lower classes, who were sold as prostitutes by economically needy relatives. Having defined new laws prohibiting exploitation of young girls and coerced detention of women for immoral purposes, the legislators turned to the warrant as an enforcement tool.[199] In a series of legislative developments over the next fifty years, the warrant provision was incorporated into Canadian law.[200]

152. The procedure set up under this section appears generally to follow the traditional model. It incorporates an information upon oath disclosing reasonable grounds and entrusts the decision to issue to a justice. Like a section 443 warrant, it may be executed by a person other than a peace officer; it differs, however, in that it may be executed "by day or night". The most remarkable aspect of the warrant, however, is the requirement that, like found-ins, and indeed their own "keepers", rescued women may be subjected to compulsory examination by a justice under section 183. This, and the power of the justice to keep a woman in custody or release her "as he considers proper" suggests at the least an aspect of an arrest beneath the semblance of the rescue operation that the provision presents.[201]

C. Narcotics and Drugs

153. Section 10 of the *Narcotic Control Act*[202] reads in part:

> (1) A peace officer may, at any time,
>
> (*a*) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic

by means of or in respect of which an offence under this Act has been committed;

(*b*) search any person found in such place; and

(*c*) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.

(2) A justice who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

(3) A judge of the Exchequer Court of Canada shall, upon application by the Minister, issue a writ of assistance authorizing and empowering the person named therein, aided and assisted by such person as the person named therein may require, at any time, to enter any dwelling-house and search for narcotics.

154. The provisions of subsections 37(1) to (3) of the *Food and Drugs Act* apply a similar regime to searches and seizures for "controlled" drugs. The one difference between the *Narcotic Control Act* and the *Food and Drugs Act* regimes is that under paragraph 1(*c*) of the latter, a peace officer is empowered to seize only "any controlled drug found in such place and any other thing that may be evidence" that an offence related to controlled drugs has been committed. Given the wide coverage of "evidence", however, it is unlikely that there is much significance in the omission from the *Food and Drugs Act* regime of the reference to containers or things "by means of or in respect of which" an offence has been committed. Finally, section 45 of the *Food and Drugs Act* applies section 37 *mutatis mutandis* to situations involving "restricted" drugs. Thus, it may be perceived that searches and seizures of narcotics, controlled drugs and restricted drugs are governed by a set of statutory provisions that are virtually identical except in the specification of the types of contraband involved.

155. Two significant points emerge from a reading of these regimes. First, in the case of authority to search a dwelling-house, the warrant is only an alternative to the writ of assistance. Second, no documentary authority of any kind is necessary when the place to be searched is not a dwelling-house.

156. The presence of alternatives to warrant procedures is the product of a historical trend, reflecting the escalation of government concern in the area. The concern began in response to the perceived opium practices of Oriental immigrants to British Columbia at the turn of the century. The years following saw a crusade against narcotics which, as MacFarlane has detailed in his study of drug legislation,[203] occurred in a climate of sensationalism created by both politicians and the press. This account of marijuana use was current in the 1920s, for example:

> Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility.[204]

Three decades later the intensity of the language had hardly abated; future Prime Minister John Diefenbaker called trafficking in narcotics "murder by instalment".[205]

157. It is not surprising, therefore, to note the increase in the severity of enforcement powers attached to narcotics and drugs legislation. In 1911, a magistrate could issue a warrant to search for illegal narcotic drugs.[206] By 1923, peace officers had acquired the power to search premises other than dwelling-houses without warrant.[207] The final dilution of the warrant's authority in narcotics cases came in 1929 when Parliament agreed to utilize the writ of assistance as an enforcement tool.[208] Similar provisions were enacted with respect to expanded categories of illegal drugs in 1961.[209]

158. The issuance of warrants under the *Narcotic Control Act* and the *Food and Drugs Act* provisions has been treated as a judicial function, analogous to issuance under section 443. Indeed, the courts have developed special requirements of particularity, insisting that the prohibited substance be sufficiently identified and that one enactment only be invoked in any individual case.[210] These meticulous legal standards, however, may be contrasted with several discretionary powers associated with *Narcotic Control Act* and *Food and Drugs Act* searches, both with and without warrant, as well as in the writ of assistance. For example, under subsections 10(4) and 37(4) of the two regimes, officers executing narcotics and drugs searches are given special, virtually unrestricted discretion to break through obstructive surfaces and containers.

159. What is truly striking about the structure of powers in these provisions is the inconsistency among the various tests

governing the different types and stages of intrusion. The authority to enter and search a dwelling-house is dependent upon the belief that a prohibited substance, and not merely evidence of a relevant offence, is on the premises. However, once inside the door, the peace officer may seize a wide variety of things, including items of merely evidentiary value. The matter is complicated even further, however, in the case of warrantless searches.

160. The complication pertains to the grammatical structure of paragraph 10(1)(*a*) of the *Narcotic Control Act*, duplicated in paragraph 37(1)(*a*) of the *Food and Drugs Act*. The placement of the words "in which he reasonably believes there is a narcotic" after the clause relating to the search with a warrant or writ raises the possibility that no reasonable grounds are needed to support a warrantless search of a non-residential place or, for that matter, the search of "any person found in such place" as permitted by paragraphs 10(1)(*b*) and 37(1)(*b*). However, the lower court authority on point has rejected this interpretation, expressing a reluctance to recognize such sweeping police powers in the absence of unambiguous statutory language requiring such recognition. In the *Jaagusta* case, for example, the British Columbia Provincial Court denied the validity of a random drug search of an individual performed pursuant to a vehicle stop.[211] In the course of judgment, Goulet D.C.J. rejected the wide interpretation of subsection 10(1) that would have allowed such a search on a discretionary basis. Such an interpretation, it was held, "would in effect legalize the most unreasonable and arbitrary searches of individuals".[212] The ratio of the decision, and others like it,[213] however, appears to be restricted to cases in which the individual searched is *not* in a place in which drugs or narcotics are reasonably believed to be present. Once such a belief exists with respect to the place, both the place itself and all individuals found inside it are subject to search. Similarly, when the premises are searched with a warrant or writ, there seems to be no restriction in the statute as to searches of persons found therein.

D. Obscene Publications, Crime Comics and Hate Propaganda

161. Subsection 160(1) of the *Criminal Code* reads:

> A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which

> are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

Subsection 281.3(1) of the *Criminal Code* reads:

> A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

Following seizure in both cases, a summons is issued to the occupier of the premises requiring him to show cause why the matter seized should not be forfeited to the Crown. Because the adjudication at the show-cause hearing focuses not upon the guilt of the possessor but upon the status of the seized materials as obscene publications, crime comics or hate propaganda, as the case may be, the provisions are often described as *in rem* proceedings.

162. The significant departure from section 443 that these provisions effect is that they allow seizure of *all* allegedly offensive material, and not merely samples that may serve as evidence. This distinction was made clear in the *Nimbus News and Distributors Ltd.* case,[214] in which the Court allowed the Crown to retain only four copies of each allegedly obscene publication seized under what is now section 443. If a section 160 warrant had been used instead, the Crown would not have been so limited. Thus, the warrants have a preventive aspect, ensuring that the materials will not enter public circulation while their legal status is being determined. This preventive aspect of the procedure may be perceived as serving two interests: keeping the materials out of public circulation, and, particularly in the case of obscene publications, curtailing the distributor's profits.[215]

163. The preventive aspect of the section 160 warrant was indeed one of the virtues described by the then Justice Minister, E. Davie Fulton, when he introduced it to the House of Commons in 1959.[216] Moreover, by providing a procedure that would work "quickly, fairly and objectively", the new warrant was said to avoid the delay consequent upon making a regular seizure and then waiting until trial to obtain an adjudication. There was a *quid pro quo* in this, of course: the absence of a charge. As Fulton commented,

> We are really providing nothing different here except that it [the amendment] will make it possible to dispose of the issue without laying a charge against the individual.[217]

Indeed, under subsection 160(7) no charge may be laid with respect to publications confiscated under the warrant, without the consent of the Attorney General.

164. The section 160 warrant was enacted into the *Criminal Code* in 1959. The particular timing of its introduction was related to two factors. First, the 1950s in Great Britain saw considerable focus upon the obscenity issue, culminating in the *Obscene Publications Act 1959*, which included an *in rem* procedure virtually identical to that found in the Canadian legislation.[218] Second, the speeches of the then Minister of Justice indicate that law enforcement officers in Canada found the existing law obsolete.[219]

165. The introduction of the section 281.3 warrant eleven years later followed a similar perception of a social crisis inadequately answered by existing legislation. The Special Committee on Hate Propaganda, formed in 1965, noted the presence of "a steady dissemination of hate propaganda, mainly anti-Jewish, anti-Negro and neo-Nazi in nature".[220] Following its recommendations, new offences were defined to prohibit the advocacy of genocide and public incitement of hatred against identifiable groups. The Committee also recommended that "study be given to the matter of the seizure of hate materials and of their confiscation, after conviction".[221] Rather than making confiscation attendant on conviction, however, the actual legislation adopted an *in rem* procedure, virtually identical to section 160, except in two respects. First, under subsection 281.3(7), the warrant procedure cannot be commenced without the consent of the Attorney General. Second, the consent of the Attorney General is not apparently necessary after seizure in order for charges to be laid under the substantive sections.

166. The issuance procedure for the warrants under these sections bears some resemblance to that under section 443: an information is sworn upon oath, and the same probative test of "reasonable ground to believe" is expressed. On the other hand, the issuer is not merely a justice of the peace, but a "judge" of one of a number of courts of record, depending upon the province. Paradoxically, though, it would appear that despite his higher rank, the judge, unlike the justice in other crime-related warrant procedures, is given no discretion in the matter. Once the prerequisites for issuance are satisfied, it is stated that he "shall" issue the warrant.

E. Weapons

167. Searches and seizures of weapons are covered by sections 99 to 101 of the *Criminal Code*. Basically, these sections encompass one power of search with warrant (subsection 101(1)) and three powers of search without warrant (subsections 99(1), 100(1) and 101(2)).

168. The statutory trend towards warrantless searches for weapons has been fairly recent. Individual post-Confederation powers to search for and seize gunpowder, arms and explosives were generally authorized through warrant procedures, or in association with arrest.[222] Many of the warrants were subsumed in the 1892 codification under the wide provisions of what is now section 443, although some special disposition procedures were retained. The first significant crack in the dam came in 1913 in a package of legislation designed to combat what the then Minister of Justice, C. J. Doherty, termed "a very large increase in the crimes of violence".[223] An officer was empowered to search "any person whom he has reason to believe and does believe has upon his person any [prohibited] weapon, device or contrivance". The warrant remained the general device for searching premises, however, until the 1953-54 revision, when the antecedent to the present section 99 was passed.[224]

(1) *Subsection 99(1)*

169. Subsection 99(1) of the *Criminal Code* reads:

> Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of this Act relating to prohibited weapons, restricted weapons, firearms or ammunition, he may search, without warrant, a person or vehicle, or place or premises other than a dwelling-house, and may seize anything by means of or in relation to which he reasonably believes the offence is being committed or has been committed.

Weapons and explosives seized under this provision are forfeited if and when a court determines, pursuant to section 446.1,[225] that they were connected to the commission of an offence.

170. Although subsection 99(1) is expansive compared to its statutory antecedents, it is limited in some significant respects. First, the section does not authorize searches of dwelling-houses. Second, the search powers it confers are restricted by certain common law

safeguards against unjustified intrusions. In particular, it only allows the peace officer to act in response to an offence he reasonably believes has been initiated. It thus does not provide the scope of "stop and frisk" provisions under which persons believed to be "about to commit an" offence may be searched for weapons.[226] Although a study prepared for the Solicitor General in 1975 recommended that section 99 be given greater prospective scope, allowing searches for firearms "about to be used illegally",[227] this modification was not made. Instead, as will be detailed shortly, preventive concerns have come to be expressed in section 101.

(2) *Subsection 100(1)*

171. Subsection 100(1) of the *Criminal Code* reads:

> Notwithstanding section 99, a peace officer who finds
>
> (*a*) a person in possession of any restricted weapon who fails then and there to produce, for inspection by the peace officer, a registration certificate or permit under which he may lawfully possess the weapon,
>
> (*b*) a person under the age of sixteen years in possession of any firearm who fails then and there to produce, for inspection by the peace officer, a permit under which he may lawfully possess the firearm, or
>
> (*c*) any person in possession of a prohibited weapon,
>
> may, unless in a case described in paragraph (*a*) or (*b*) possession of the restricted weapon or firearm by the person in the circumstances in which it is so found is authorized by any provision of this Part, seize such restricted weapon or firearm or such prohibited weapon.

Like subsection 181(2), this is manifestly a "seizure" power that does not authorize entry into private domains. After seizure, a weapon may be declared forfeited pursuant to a magistrate's order under subsection 100(3).

172. This provision was originally introduced in the 1930s, as weapons legislation began to concentrate on trafficking in firearms, and in particular the sale of guns to minors. The predecessor to subsection 100(1) was part of this program; it specifically focused on the seizure and forfeiture of weapons illegally carried by minors.[228] As gun control legislation grew more complex in subsequent years, the seizure and forfeiture provisions came to embrace prohibited and restricted weapons as well. Still, like subsection 99(1), the operation of these provisions is restricted to circumstances indicative of the commission of a firearms offence.

(3) *Section 101*

173. Section 101 of the *Criminal Code* reads in part:

> (1) Where, on application to a magistrate made by or on behalf of the Attorney General with respect to any person, the magistrate is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of that person, or of any other person, that that person should have in his possession, custody or control any firearm or other offensive weapon or any ammunition or explosive substance, the magistrate may issue a warrant authorizing the search for and seizure of any firearm or other offensive weapon or any ammunition or explosive substance in the possession, custody or control of that person.
>
> (2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of that person, or of any other person, that that person should have in his possession, custody or control any firearm or other offensive weapon or any ammunition or explosive substance and that the danger to the safety of that person or other persons is such that to proceed by way of an application under subsection (1) would be impracticable, the peace officer may without warrant search for and seize any firearm or other offensive weapon or any ammunition or explosive substance in the possession, custody or control of that person.

174. The powers of search and seizure contained in section 101 are manifestly preventive; they are triggered not by the perception that an offence has been initiated but by an assessment of the interests of safety. This feature puts subsections 101(1) and (2) in direct contrast with section 99 and subsection 100(1). To some extent, the provisions have been viewed as complementary:

> Of the four provisions, two (ss. 99 and 100) deal with actual breaches of the Code, and accordingly relate predominately to the reduction and discouragement of criminal usage. The remaining two [ss. 101(1) and 101(2)], apply to situations of *apprehended* danger rather than criminal activities *per se*. Accordingly, they relate more to the objective of reducing access to irresponsible users, i.e., prevention.[229]

As laudable as this objective may be, the departure represented by subsections 101(1) and (2) from conventional crime-related search and seizure powers cannot be overemphasized. It is not even a prerequisite of intrusion under these subsections that a person be believed to be in possession of a weapon. It need merely be believed that he *ought not* to possess a weapon.

175. Section 101, although enacted in its present state in 1977, may be traced back to gun control legislation introduced nine years earlier which provided for a warrant to "seize" firearms in the interests of safety.[230] The target of the warrant provision at that time was described by the then Minister of Justice, John Turner, in quite narrow terms: the threat posed by the possession of weapons and explosives by persons of unsound mind.[231] This warrant provision, however, was limited in certain respects. As was recognized in the *Colet* case, it did not authorize the intrusive *searches* or *entries* necessary to effect the relevant seizure.[232] Rather, it seemed to assume that the presence of the weapon had been ascertained before any intrusion took place. Moreover, the requirement that a warrant be obtained made the provision of little use to a situation of particular concern to the police: the domestic or neighbourhood dispute in which a weapon was accessible.[233] Accordingly, in 1977, the provision was expanded to include an express search power, and a warrantless provision designed to meet the emergencies of neighbourhood and domestic disputes was added as well.

176. As it currently stands, section 101 may be said to have two distinct aspects. The first of these is directed to law enforcement in an immediate sense — the need to defuse a dangerous situation by depriving a person of a weapon that he might use to commit a crime. The second appears to be of the more lasting regulatory nature that characterized the 1968 legislation — to ensure that weapons are not possessed by persons who should not be in possession of them. This latter concern is reflected not only in the search and seizure provisions themselves, but also in the *in rem* aspects of the section, which in many ways reflect the procedures under sections 160 and 281.3. At a hearing initiated by the Crown under subsection 101(4), a magistrate is empowered to determine whether, "in the interests of safety", the person should have weapons in his possession. Upon making a negative finding, the magistrate may, under subsection 101(6), order the weapon to be disposed of on fair and reasonable terms and/or prohibit the possession of a weapon by that person for up to five years.

177. Beyond the significant departures from normal standards represented by the grounds for intrusion and the *in rem* procedures, the subsection 101(1) warrant presents other special features. Unlike the warrants previously mentioned, it could be construed to authorize the search of a person.[234] It must be obtained, not by an information upon oath, but by "an application to a magistrate made by or on behalf of the Attorney General". No reference is made to the

swearing of an oath during the application proceedings, although the magistrate is specifically required to hear evidence at the "disposition" hearing. No time limitations are imposed upon the execution of the warrant, but paragraph 101(3)(*a*) requires that a return be made to the magistrate forthwith after seizure, showing the date of execution.

F. Precious Metals

178. Subsection 353(1) of the *Criminal Code* reads:

> Where an information in writing is laid under oath before a justice by any person having an interest in a mining claim, that any precious metals or rock, mineral or other substance containing precious metals is unlawfully deposited in any place or held by any person contrary to law, the justice may issue a warrant to search any of the places or persons mentioned in the information.

Under subsection 353(2), the issuing justice is given powers to make detention, restoration or forfeiture orders with respect to things seized under subsection 353(1).

179. This search warrant is truly one of the curiosities of our criminal procedure. At first glance, it might appear to deal with stolen minerals, and indeed its origin was a provision in the 1869 Canadian *Larceny Act*. The context of the provision in that enactment, however, indicates a more peculiar purpose: it was at least partly an enforcement provision for an administrative scheme designed to prevent illicit trading in gold and silver.[235] The "unlawfulness" contemplated by the section thus included the failure to properly disclose, conduct or register a transaction in these precious commodities, as well as their theft. The administrative scheme, which had a tenuous relationship at best with truly criminal conduct, did not survive the 1892 codification. The warrant, however, was consolidated into the procedural section of the *Criminal Code*, where it has remained to this day.

180. The procedure envisaged by section 353 is quite similar to that contemplated under section 443. It does allow the search of persons, however, and restricts applications to "any person interested in a mining claim". Since the removal of the administrative scheme, it would appear that there has been only one *Criminal Code* provision to which the warrant has had particular reference: the offence of fraud in relation to minerals defined in section 352.

G. Timber

181. Subsection 299(3) of the *Criminal Code* reads:

> A peace officer who suspects, on reasonable grounds, that any lumber owned by any person and bearing the registered timber mark of that person is kept or detained in or on any place without the knowledge or consent of that person, may enter into or upon that place to ascertain whether or not it is detained there without the knowledge or consent of that person.

182. This provision for warrantless search bears some similarity to the warrant for precious metals in that it may be traced to a regulatory scheme over natural resources, established in the early days of Confederation.[236] While the essential facets of the timber-marking scheme have remained outside of criminal legislation, violation of the scheme was deemed serious enough to justify coverage in the 1892 *Criminal Code*,[237] and it has remained in the *Criminal Code* ever since. Relevant provisions in today's *Criminal Code* include the offences regarding timber marks in subsections 299(1) and (2), and the special rules of evidence set out in subsections 299(4) and (5).

H. Cocks in the Cockpit

183. Subsection 403(2) of the *Criminal Code* reads:

> A peace officer who finds cocks in a cock-pit or on premises where a cock-pit is located shall seize them and take them before a justice who shall order them to be destroyed.

184. This seizure power is traceable to early legislation against cruelty to animals, a cause strongly advanced in the Victorian era both in England[238] and in Canada. Cockfighting itself was singled out for attention in Canada in an 1880 package of legislation amending the existing *Cruelty to Animals Act*.[239] Under the new provisions, cocks found in a pit were forfeited to the municipality, which was then entitled to sell them for its benefit. Subsequently, the legislation prescribed that the birds be destroyed. The actual power to seize the birds was not made explicit until the 1953-54 revision of the *Criminal Code*, when the present wording was adopted. It is significant that under this wording an order for forfeiture, while required to be

pronounced by a justice, is mandatory upon presentation of the bird by the police officer.

I. Items Related to Counterfeiting

185. Section 420 of the *Criminal Code* reads:

> (1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.
>
> (2) A peace officer may seize and detain
>
> (*a*) counterfeit money,
>
> (*b*) counterfeit tokens of value, and
>
> (*c*) machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are intended for use in making counterfeit money or counterfeit tokens of value;
>
> and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings.

186. The power conferred here is once again solely one of "seizure". The items covered are the paper and instruments with which possession offences relating to currency under the *Criminal Code* may be committed; possession of counterfeit money (section 408), for example, or the possession of counterfeiting machines, tools and instruments (section 416). The basis of seizure, however, is not simply that the relevant items are illegal to possess and ought to be forefeited to the State, as in the case of narcotics, gaming-house equipment, cocks in the cockpit and offensive weapons. Rather, the provision declares that ownership of the specified items resides in Her Majesty. Thus, the ostensible legal status of the seizure and disposition of the items becomes one of the State vindicating a right of property. Parliamentary debates occurring upon the provision's introduction in 1925 indicate that the purpose behind this feature was to ensure that, regardless of whether or not the possessor of the paper or instruments was convicted, they would remain under State control.[240]

CHAPTER THREE

The Need for Reform

187. Is the present assortment of crime-related search and seizure powers satisfactory? Simply by looking at the legal provisions themselves, their arrangement and the way they have grown, one may discern a number of fundamental problems.

I. Existing Problems

188. Rather than attempt to represent each individual difficulty relating to particular search and seizure provisions, we have attempted to condense and categorize our observations. This approach conforms with our objective in Part One of analyzing search and seizure provisions as a whole, and reflects our perception that many problems cut across the spectrum of existing laws in this area.

189. Adopting this approach, we perceive the following problems in law and practice:

(a) incoherence;
(b) anachronisms;
(c) expanded powers to intrude;
(d) the abandonment of the warrant;
(e) the gulf between law and practice;
(f) accountability problems; and
(g) constitutional problems.

A. Incoherence

190. Perhaps the first thing one notices about the assortment of available powers is that their features differ so greatly. This is particularly true in the case of warrants. Warrants are obtained through informations, applications and reports, and are issued by justices, judges and magistrates. While all but one of the procedures require the disclosure of "reasonable grounds to believe" on the written application, the structure of this belief varies widely from provision to provision. Section 443 of the *Criminal Code* requires a link between the items to be sought and an offence, primarily of an evidentiary nature. The *Narcotic Control Act* and the *Food and Drugs Act* provisions, however, exclude purely evidentiary items as objects of a warrant, and the belief requisite under section 181 of the *Criminal Code* does not relate to items, but simply to offences. While section 443 runs the gamut from offences past to offences future, section 181 is restricted to offences "being committed", and section 101 is related to no offence at all. And the list goes on.

191. In its Report entitled *Our Criminal Law*, the Law Reform Commission of Canada affirmed the value of rationality as a principle of substantive criminal codification:

> At present we have a complex, cumbersome collection of sections, many of which have been added from time to time *ad hoc*.... Such excess detail blurs the simplicity, obviousness and directness of the general message of the Code.[241]

Similar considerations ought to inform a discussion of procedural schemes such as search and seizure powers. A system of provisions with as many procedural quirks as the existing assortment of crime-related powers is really no system at all. Rather than a structure in the nature of a system, this assortment is truly a product of historical increment and, in many cases, accident.

192. The argument in favour of rational simplification is not simply a theoretical or aesthetic preference. An incoherent assortment of powers produces distinct practical consequences. First, it causes some degree of administrative confusion. This confusion is evident, for example, in decisions such as *Goodbaum*[242] and *Campbell* v. *Clough*,[243] which have invalidated search warrants for narcotics because of the use, incorrectly, of section 443 warrant forms. The instances that appear in the case-law are not atypical. In the Law Reform Commission's survey of police search warrant practices in Winnipeg, for example, it was found that both federal and

municipal forces were using warrant forms that attempted to straddle the requirements of section 443 of the *Criminal Code* and the *Narcotic Control Act* and *Food and Drugs Act* provisions. Of thirty-nine narcotic and drug warrants in the sample, twenty-six were found invalid, twenty-two of them by reason of a confusion of statutory requirements.[244]

193. Second, this incoherence admits the possibility of manipulation. Since procedural avenue *A* may recognize justifications for intrusion unavailable through other routes, the opportunity is presented to a peace officer with ingenuity to use procedural avenue *A* whether or not it was intended to serve the particular type of investigation being pursued. That officers often take advantage of these opportunities is hardly surprising, and in some cases quite understandable. For example, an officer investigating a drug trafficking offence may believe that documentary evidence is concealed in certain premises. Yet the existing *Narcotic Control Act* and *Food and Drugs Act* provisions do not allow him to obtain a warrant to search these premises unless he also believes the contraband itself is there. If the officer is not prepared to swear to this, his alternative in terms of warrant procedures is to resort to section 443 of the *Criminal Code*. Yet, after the *Goodbaum* case, it is clear that the section 443 warrant is unavailable for an offence under *Narcotic Control Act* and *Food and Drugs Act* provisions. Accordingly, he is frequently driven to allege the *Criminal Code* offence of *conspiracy* to traffic, an allegation that may or may not be properly founded.

194. The objective of coherence should not, of course, lead to obstinate single-mindedness; one ought not to disregard demands for specialized provisions in justifiable cases. However, a specialized provision ought only to complicate the picture when a convincing reason is made for it. Quite simply, the reasons for the procedural quirks of our various search and seizure provisions need to be comprehensively examined.

B. Anachronisms

195. Three hundred years after Sir Matthew Hale described the common law warrant for stolen goods, the basic procedure has changed remarkably little. Yet the circumstances that gave rise to the

features of Hale's warrant are in many cases no longer applicable. If the warrant document came into use as a measure for more efficiently transmitting the justice's authority and sparing him the ordeal of travelling in hazardous conditions, how efficient is it now in the light of modern methods of transportation and communication? There is considerable rigidity in the present documentary procedure. Not only does this represent a failure to assimilate technological advances, but it may also render the procedure increasingly ineffective as the technology used by lawbreakers becomes more sophisticated.

196. Another anachronism is the restriction of most search and seizure powers to "things", particularly in the case of those powers concerned with the recovery of the fruits of crime. The original common law search warrant developed by Hale was for stolen "goods". This focus on tangible objects was carried into subsequent provisions for search and seizure covering crimes of theft, including the present subsection 443(1) of the *Criminal Code*. This focus, however, excludes from coverage forms of property such as funds in financial accounts,[245] or information from computers,[246] which may represent the fruits of a crime. This focus is explicable in large part by the historical concentration of theft and fraud offences on tangible goods;[247] indeed, until 1975 the offence of possession of property obtained by crime currently set out in section 312 was itself restricted to tangible things.[248] The expansion of these offences under criminal law to include intangible forms of property demands a modernization of search and seizure law as well.

197. Aside from such procedural considerations, there is the question of the contemporary validity of certain assumptions underlying special search and seizure provisions. Perhaps the foremost among these are the present gaming- and bawdy-house powers. The issue of whether these provisions reflect contemporary social attitudes to some extent involves the question of abolishing substantive offences as well as procedures.[249] But insofar as these powers manifest not only a recognition of the target activities as crimes but as evils justifying special procedural treatment, the assumptions underlying them merit particular examination here. On a more diminutive note, one might well question the value of the special provisions for precious metals. If the administrative system that the search power was largely set up to serve is no longer in place, what justification can there be for retaining it?

C. Expanded Powers to Intrude

198. The consistent trend in the growth of search powers has been to provide the State with more and more justifications for intruding into zones of individual privacy. Of course, this proliferation has not been restricted to police powers in the enforcement of criminal law. The past fifty years have seen a vast increase in the regulatory and redistributive roles played by government. Yet the increase of police powers is in a sense peculiar in that it has represented, not the assumption of a new role for the State, but rather the steady adjustment of rights and powers in order to fulfil a long-existing mandate. The conception of the State as keeper of the peace and protector of individual security has remained relatively constant in English and Canadian traditions over the past 300 years. What seems to have changed most radically is the relative weight accorded social, as opposed to individual interests and, correspondingly, the style of peace-keeping perceived as appropriate to maintaining the balance thus struck.

199. Many of the ways in which this situation has come about are taken for granted by Canadians as necessary for a well-policed society. Yet the fact is that other common law jurisdictions have been much more reluctant to make the concessions to law enforcement that Canadians have made. An illuminating and perhaps surprising example is that of the search warrant for "evidence of an offence" that is not itself stolen property or contraband. The recent British Royal Commission on Criminal Procedure recommended that, for the first time in Britain, orders and warrants be instituted to seize such evidence. It stated its recommendation, however, with considerable trepidation and qualifications, proposing that the compulsory power of search be one of last resort, invoked in exceptional circumstances, and available in respect only of grave offences.[250] That a section 443 warrant to search for any evidence of any *Criminal Code* offence has been in effect in Canada for ninety years illustrates the comparative ease with which search powers have expanded in this country.

200. One of the critical aspects of this expansion has been the shift from responsive to preventive policing. This distinction is to some extent arbitrary: as one R.C.M.P. inspector has noted, "[w]e *react* by introducing preventive measures in the same way as we react to crime through enforcement — after the fact".[251] However, the distinction is a meaningful one in that it has been at the heart of a

number of significant developments in the history of police powers in general, and search and seizure powers in particular.

201. The first search and seizure powers, predating the police, were essentially responsive to the commission of a crime; indeed they were closely tied to the powers to arrest the offender. The common law warrant for stolen goods envisaged the victim of the crime complaining to a justice, who would issue the warrant to bring the unlawful possessor before him, as well as return the property to the victim. At common law, the warrantless power of personal search was firmly associated with arrest. As the powers have expanded, this association has broken down.

202. The first great departure in warrant procedures from responsive search was effected by the proposal in the 1880 Draft Code covering things *intended to be used* for the purpose of committing an offence. Preventive as it may have been, this provision nonetheless retained the idea of focusing on specific criminal conduct as the justification for intrusion, albeit conduct about to occur. However, the most recent firearms provisions in section 101 of the *Criminal Code* are not so limited. Indeed, the "interests of safety" do not necessarily contemplate even the future commission of criminal conduct. Quite simply, the power afforded by section 101 makes the participants in the search and seizure process not merely preventers of crime, but also judges of what conduct or circumstances demand a preventive intrusion.

203. Another manifestation of expanding justifications for intrusion is the *in rem* proceeding. While section 160 is triggered by the commission of an offence — the keeping of obscene material for sale or distribution — the operation of section 281.3 is not (unless the keeping of publications for distribution constitutes an inchoate offence such as conspiracy or attempt to communicate hate propaganda). What is significant about these procedures, however, is that they represent a parallel system of adjudication outside the regular criminal process of charge, trial, conviction and sentence. Nobody is put on trial in an *in rem* proceeding; rather, it is the material itself that is on trial. Since crime is by its nature personal, the association between crime and intrusion is profoundly altered by the powers under these sections.

204. The shift in justifications to intrude has not been accompanied by any general assessment of its impact upon the balance between police powers and individual rights. Rather, the tendency has been to speak of each new power as striking this

balance in its particular context, without looking at how the larger picture is affected. The larger picture has been affected, though, and it is timely to give proper recognition to that fact. It is therefore important that the general principles that justify intrusive searches and seizures be articulated anew, and that departures from these general rules be recognized as such and analysed accordingly.

D. The Abandonment of the Warrant

205. Another noticeable trend, particularly in recent times, has been the creation of new and wider exceptions to warrant requirements, particularly insofar as intrusions into private domains are concerned. Historically, at common law, the only non-consensual searches of private premises that could be performed without warrant were associated with the power to arrest and the duty to preserve human life or safety. As statutory search powers have developed, however, reliance on the warrant has diminished, both in the cases of federal statutes in general, and crime-related search provisions for weapons, narcotics and drugs in particular. In a way, this trend complements the proliferation of justifications to intrude. Not only has the sequential context of intrusions been relaxed, but so have the procedural requirements for obtaining authority. Both phenomena reflect a trend toward conferring greater authority and greater discretion upon the police: the same intrusion powers as are appropriate for the investigation of crime are increasingly assigned for its prevention; and, correspondingly, the police have increasingly been left to decide for themselves when the exercise of their powers is justified.

206. Earlier in this paper, we noted that, however much it may be limited in theory by "reasonable grounds" requirements, a warrantless power represents a relatively discretionary mode of authorization.[252] In essence, the peace officer has come to acquire discretion, particularly with respect to entry onto private domains, of a breadth and variety unimaginable when the first common law powers of search and seizure were developed. When his coercive powers are combined with the opportunities recognized at law to perform searches on consent, the peace officer's range of discretionary options is formidable indeed.

207. The diminished significance of the warrant is not merely a matter of statutory preference; rather, it appears to be a fact of police

practice. Indeed, the addition of a warrantless provision to a search and seizure regime may virtually preclude the use of the warrant component. For example, since 1977, when the power to make warrantless searches and seizures under section 101 was introduced, it appears to have been used virtually to the exclusion of the section 101 warrant. This tendency has been defended on the basis that the neighbourhood and domestic disputes addressed by section 101 usually involve an emergency.[253] While it is possible that many of the warrantless entries made by virtue of subsection 101(2) might have been made on a peace-keeping basis even if the subsection had not been enacted, there is doubt, particularly in the light of the *Colet* case,[254] that all such entries would have been legal. Of more immediate significance, however, is that the enactment of subsection 101(2) has had the effect of diminishing police reliance on the warrant as the legal basis for entries into premises for the purposes of the section as a whole.

208. The use of warrantless alternatives to search privately occupied places is not restricted to matters involving firearms. In a recent participant-observer study in an Ontario jurisdiction, twenty-seven entries onto property were described; of these, ten were effected without a search warrant. While occupants of the premises were arrested in eight of the ten cases, it appears that the searches themselves often proceeded on a consensual basis.[255] This observation conforms with information received by our researchers in discussions with members of various Canadian police forces about searches of premises with consent. In fact, these discussions revealed a range of attitudes. Some officers took the view that obtaining warrants ought to be preferred in all possible cases, others maintaining that it is often permissible to attempt to gain consent before resorting to warrant procedures. Some police forces stated that consent to search private premises before obtaining a warrant would only be requested of persons arrested outside the premises in question. While the reported presence of consent of the occupant may appear to nullify concerns associated with the absence of a warrant, we believe that these instances raise problems of accountability, which will be discussed shortly.[256]

209. To some extent, the diminished significance of the warrant reflects not a preference for police control over decision-making so much as the conclusion that the inefficiencies of warrant procedures leave no other alternative. In some cases, this is a matter of speed; the warrant procedure is viewed as too slow to meet the exigencies of certain situations. Asked why, in cases of search with writ of

assistance, a warrant was not used instead, approximately 74% of officers responding to a Commission survey cited urgency of some sort as the reason.[257] For one thing, these claims reinforce the need to examine the inefficiencies in warrant procedures themselves. If obtaining a warrant can be technically facilitated without sacrificing its judicial and particular characteristics, then there is less need for alternative, more expeditious forms of authorization. But the arguments of necessity underlying the expansion of warrantless search and seizure powers themselves need to be examined carefully.

210. This question may be addressed with particular reference to specially focused powers, such as those provided to holders of writs of assistance. Defenders of the writ point to the peculiar difficulties experienced by narcotics and drugs investigators, in particular the frequent need for speedy authorization. An R.C.M.P. superintendent appearing before a parliamentary committee, for example, recently cited the "requirement for spontaneous action to allow us to intercept the drug itself".[258] While the special power to make a warrantless entry into private premises with a writ is obviously conducive to "spontaneous action", however, the question arises as to whether or not the use of the writ is necessary. A Commission study has concluded that the writ power may frequently be invoked when other more general options, such as the power of entry ancillary to arrest,[259] are available to the investigating officers.[260]

211. However, the larger question remains that of the justifiability of resort to warrantless powers rather than warranted ones. Both American statutes and jurisprudence on the Fourth Amendment express a preference for authorization by warrant, subject to provision for warrantless modes of authorization in justified instances.[261] Because of the Canadian history of warrantless search and seizure powers being developed one by one to address specific problems, this approach has not been explicitly cast as an informing principle of Canadian law. As indicated earlier this approach may be mandated by section 8 of the *Canadian Charter of Rights and Freedoms*; even if it is not, however, we view the approach as a sound and useful policy.

E. The Gulf between Law and Practice

212. Although the conformity of police practice with applicable legal rules is an important issue in many aspects of search and

seizure, it is perhaps most readily ascertained in the context of warrant issuance. This is largely due to the documentary nature of the procedure, which facilitates examination and evaluation. Accordingly, as part of our research programme, we examined practices of search warrant issuance over four-month periods in seven Canadian cities: Edmonton, Fredericton, Montréal, Saint John, Toronto, Winnipeg and Vancouver. The warrants covered by the survey only included those which could be issued by a magistrate or justice of the peace; hence, the survey was not designed to capture warrants issued pursuant to sections 160 and 281.3. Part of our purpose was to obtain a reliable assessment of the legality of search warrants issued in these cities. Accordingly, we assembled a panel of Canadian judges from superior and appellate courts to evaluate a stratified random sample of the application documents (informations or reports in writing) and warrants captured in our survey. Detailed results of these evaluations are presented elsewhere,[262] but the conclusion may be stated in simple terms: there is a clear gap between the legal rules for issuing and obtaining search warrants and the daily realities of practice.

213. The judicial panel rated 39.4% of the warrants included in their sample as validly issued, and 58.9% as invalidly issued, leaving 1.7% which could not be conclusively rated due to obscured or incomplete documentation.[263] The judicial panel found that fatal defects were most likely to occur in section 443 and *Narcotic Control Act* and *Food and Drugs Act* warrant documents. Only in the case of warrants issued under section 181 of the *Criminal Code*, the requirements of which are noticeably more lenient, did the valid warrants exceed the invalid ones.

214. What went wrong? The bases upon which the invalid warrants were found to be inadequate were usually more than formal. In fact, figures for both the written applications (informations or reports) and the warrants themselves were quite positive in terms of formal tests: of those which could be conclusively evaluated, 85.5% of the applications and 73.5% of the warrants were judged to be formally correct.[264] The formal deficiencies that did appear tended to be in *Narcotic Control Act* and *Food and Drugs Act* warrants, and were fairly significant in character. While there were some purely clerical errors, such as the inadvertent omission of a justice's signature, there were also consistent failures on the part of certain police forces to adhere to existing statutory requirements. For example, *Narcotic Control Act* and *Food and Drugs Act* provisions requiring that the executing officer be named in the warrant were frequently ignored both in Winnipeg and in Montréal.

215. The results turned more negative when probative and substantive tests were applied. In the case of section 443 and *Narcotic Control Act* and *Food and Drugs Act* warrants, the critical probative test is the presentation of reasonable grounds to believe — a test that basically ensures the "judiciality" of warrant issuance.[265] In 67.8% of the warrant applications conclusively evaluated, the judicial panel found the test satisfied; in 32.2%, it did not. If this bare maintenance of a 2:1 "judiciality" ratio is somewhat distressing, even worse is the statistical breakdown relating to the substantive requirements. These requirements, which largely maintain the "particularity" protections of the warrant,[266] identify the search by items to be seized, premises to be searched, and offences alleged. Only 53.8% of the conclusively evaluated applications were found to comply with legal standards in this respect; the corresponding figure for the warrants was 48.7%.

216. The general failure of the warrant documents to adhere to legal standards does not mean that most searches carried out under the warrants *could not* have been legally authorized. The fact that 61.6% of the executed warrants reported in the cross-country survey resulted in a seizure of the item or type of item specified in the warrant supports the inference that in many cases the police officers concerned had an adequate factual basis for their initiative to search.[267] Indeed, an analysis of the documents in the judicial panel sample shows no decisive relationship between the legality of the search and the eventual seizure of the specified item.[268] This argues against the possibility that the widespread illegality of the warrants is attributable to police decisions to search in inappropriate cases. Rather, the indication is that the problem resides with adherence to procedures. In other words, the necessary factual basis for a search may well exist, but the warrant is nonetheless being issued improperly.

217. Perhaps the most striking aspect of the results was the evidence that adherence to warrant requirements was to a large extent a product of local practice. The best record was presented by the warrants received from Vancouver, 71% of which were issued validly; at the other end of the spectrum was Montréal with 17%. In between stood Toronto with 50%, Edmonton with 36% and Winnipeg with 27%.[269] And these variations can be traced further to particular idiosyncrasies of local origin. For example, the low figures in Winnipeg and Edmonton are attributable in part to the inadequate narcotic and drug warrant forms that were in use in 1978. At least one office in Montréal had developed the practice of not requiring any

written elaboration of reasonable grounds to support the issuance of a warrant.

218. This raises a significant issue: Why is it that the various cities have been left, in effect, to decide upon their own procedures? In a legal system under which rules of criminal procedure are purportedly fixed in federal legislation, why have standards become so varied and so relaxed? The first and obvious conclusion is that there is a lack of effective mechanisms to enforce the legal rules. This is unquestionably a serious problem; we address it in detail in Chapter Ten of this paper. In the meantime, we will point to some explanatory factors disclosed by our empirical research.

219. One may discern in local improvisations some attempts to overcome deficiencies in existing legislation. For example, while section 443 requires that informations be in Form 1, this form as outlined in the *Criminal Code* itself does not satisfy the requirements of section 443.[270] Confronted with this dilemma, different cities developed different variations on Form 1; indeed, in Winnipeg and Montréal, different court offices in the same city were found to be using radically dissimilar forms. These forms in turn were often the basis upon which documents for applications under *Narcotic Control Act* and *Food and Drugs Act* legislation (which prescribes no form) were prepared. The fluctuation in validity rates between the various cities reflects to some extent the success of such improvisational ventures.

220. There is a more profound factor that must be taken into account, however — the existence of differing local attitudes towards search warrant issuance. Despite the repeated reference in case-law to the zeal of the common law in preventing unjustified invasions of private rights, the warrant process has not uniformly been viewed as a judicial one. A recent report of a study of detective work in a jurisdiction near Toronto includes the following passage:

> The detectives had developed longstanding relationships with particular Justices of the Peace and relied on their routine co-operation to ease their tasks. Thus, one detective said he regularly used two out of four possible Justices of the Peace available in his divisional area because he had a "good relationship" with them, which translated meant a "co-operative" relationship. Occasionally this co-operation went well beyond the point of signing warrants without question. On one occasion, two detectives went to five addresses, mainly for the purpose of locating a suspect. Anticipating resistance from the various occupants, they took along some unsigned search warrants and "left handed" them (signed a J.P.'s name) as they went. These warrants were

later logged in the divisional records, and the two Justices of the Peace whose names were used were subsequently contacted and their collaboration gained. In another situation the detectives arrived at an address to undertake a property search only to discover that the Justice of the Peace had dated the search warrant but had mistakenly not signed it. Commenting, "Just like the old days, left-handing a warrant," one detective signed the name of the Justice of the Peace and proceeded to effect the search.[271]

221. The more common apprehension, however, remains the suspicion that the justice treats search warrant issuance as a "formality".[272] While obtaining a warrant was by no means a formality in all of the cities surveyed, there were some instances in which the detail presented in the application to the issuer was so sketchy as to call into question whether the issuer really bothered to evaluate the documents he was given. In Montréal, for example, informations rarely included any elaborations of the officer's grounds for belief. In some cases, the applicant simply reported that reasonable grounds arose from inquiries conducted by the police. This sort of description gives an adjudicator no objective basis for making a judicial determination as to whether or not to issue a warrant. To simply concede to the police officer's assertion that he has the grounds for conducting a search is to render the warrant process close to meaningless.

222. This is not to say that no issuers of warrants appreciate the significance of their function. Indeed, the survey discovered instances of local officials not only complying with *Criminal Code* standards, but imposing further safeguards of their own upon the authorized search. For example, the judges and justices in Edmonton developed the practice of imposing expiry dates upon warrants issued, despite the absence of a statutory requirement for doing so. Moreover, it is possible that the standards of some municipalities have improved since the survey. For example, in recent consultations with officials in Montréal, Commission researchers were told that local practices had been upgraded significantly through adoption of new procedures and the removal from office of a number of warrant issuers who had not been sufficiently judicial in their attitude. Ultimately, however, the variation in local standards suggests that assuming a judicial posture is in effect a discretionary local decision made with respect to individual issuers or groups of issuers.

223. To some extent, the police are also responsible for the quality of applications yielding warrants; after all, they generally fill in the documents. Police instructional materials set out the relevant

standards for officers who resort to search warrant procedures. Yet there is some reluctance on the part of both police and court officials to believe that officers can realistically be expected to comply with existing tests. This reluctance, which was expressed to Commission researchers during consultations, might help to explain both the unfavourable judicial panel results and the lenient attitude of some court officials towards badly prepared documents. Some justices quite candidly stated that they were willing to overlook certain legal niceties, particularly late at night when there was a degree of urgency to the matter.

224. Some of the complaints about the difficulties of preparing search warrants reflect problems recognized earlier about the anachronistic and incoherent state of the law. But these features stop short of making the warrant procedures impossible to follow. In Vancouver, at least, the record of compliance appeared strong. Why did officials in this city do so much better than the national average? Only tentative answers emerge from the available data. It may be attributable to the development of local traditions generally, and to the greater care taken to ensure the formal quality of the documentation in use. It is worth noting also that British Columbia's justices of the peace were selected from the ranks of court administrators by the provincial judicial council and given the benefit of extensive educational programmes.

225. It is also perhaps significant that Vancouver's sample of search warrants contained so large a proportion of commercial crime investigations. About one-third of the sets of documents in the judicial panel sample portion from Vancouver were directed towards this kind of investigation.[273] Not all of the commercial crime documents were valid; indeed, only 69% were pronounced valid, a slightly lower figure than that for the Vancouver sample as a whole. However, the errors committed in these invalid cases tended to be isolated, such as the omission of a signature on an otherwise flawless document. On the whole, warrants related to commercial crime were extraordinarily detailed, not only from Vancouver but from other cities such as Toronto and Fredericton in which they also appeared frequently. It was not uncommon for informations to occupy three extra pages relating specifics about the offence alleged and its connection to items possessed by the individual concerned. In other words, even when invalid, the informations provided the justice with an intelligent basis upon which to decide to issue the warrant.

226. Why these documents in particular? Since the transactions involved in a conspiracy or fraud tend to be complex, perhaps it is

natural that their descriptions on warrant documents would be more lengthy. More significant, however, is the perception that searches with warrant in commercial crime investigations carry a greater likelihood of being challenged. It is therefore not uncommon for Crown attorneys to assist in the preparation of the application. Whether or not a Crown attorney is called upon, however, it seems clear that the greater anticipation of a challenge to the legality of such searches has a salutary effect upon the quality of the application process.

227. The warrant is meant to offer protection to all individuals whose rights might be infringed by an intrusion authorized under it, not merely those likely to have the legal resources to challenge the intrusion. That there should be a double standard in the preparation of search warrants suggests, at the very least, that there is a considerable potential for reducing the disparities between law and practice.

F. Accountability Problems

228. In a sense, the deficiencies noted above with respect to warrant issuance reflect shortcomings in standards of accountability. In this regard, however, the problems pertaining to warrantless searches and seizures are more serious still. Even if the warrant is issued in a cursory manner, certain protections are built into warrant procedures. For example, in the *MacIntyre* case, it was held that documents from a search warrant application are matters of court record and available as of right to the individual concerned and the public after the search has been executed and the object seized.[274] Among other consequences, this right of access to a documentary record facilitates review of the legality of the warrant. By way of contrast, accountability for warrantless searches and seizures is generally curtailed by the conditions of "low visibility"[275] typically characteristic of police work — no documentary record of any kind is available as of right to an individual aggrieved by a warrantless intrusion.

229. Aside from procedural impediments to effective review, accountability may also be complicated by the patterns of use characterizing provisions for warrantless search and seizure. We illustrate this problem with specific reference to the use of the

provision for warrantless search with consent. According to participant-observer studies, suspects' consent to personal searches by patrol officers is the norm;[276] this confirms comments offered by police officers consulted by the Commission. That such consent is the product of a voluntary choice on the part of persons affected is contradicted, however, by the results of interviews with suspects themselves. Over half of a recently reported sample of suspects explained that they complied because they believed that the police had general authority to search whenever they wanted. Other suspects referred to threats of force and powers associated with arrest in their explanations.[277] Even if one has reservations about the veracity of some of these accounts, this in itself points out the difficulties of ascertaining true consent.

230. Consent is also a frequent basis for searching private premises, as was noted earlier.[278] In this respect, consent appears to be treated by peace officers as one of a number of options available for gaining entry into private premises and as such is valued more or less highly by different police forces. In this connection, it has been observed that an occupant's consent is frequently sought even after officers have obtained warrants in advance. The peace officers' strategy in such situations is to have the warrant available as a back-up, but to attempt to gain additional psychological and legal advantages perceived to stem from the receipt of consent.[279]

231. The frequent reference to consent as the source of authority for a search frustrates accountability in two ways. First, reliable determination of consent itself may be difficult if the issue is ever raised subsequent to the search; passive acquiescence of an individual to a peace officer's suggestion may not reflect a truly voluntary state of agreement. Indeed, some peace officers conceded to Commission researchers that true consent to a personal search by a police officer might indeed be rare; more likely, the individual would feel intimidated by the officer into co-operating. No procedures were instituted among these officers to ensure or verify the existence of meaningful consent to personal search. On the other hand, various divisions of the R.C.M.P. have used consent acknowledgment forms in the case of search of premises.

232. Second, the possibility arises that consent is being obtained for searches that could not be authorized on a non-consensual basis by any existing power because no grounds for search sufficient to invoke a power exist. In our empirical studies we found an example of this problem in cases of personal search conducted during the execution of warrants issued under section 443

of the *Criminal Code* and other provisions that do not authorize personal search. Only a minor percentage of personal searches were explained with reference to arrest or other protective factors that might have invoked existing powers; ultimately, some 82.6% of the personal searches occurring in the execution of those warrants were reported as performed for purposes outside existing legal parameters.[280] In consultations with Commission researchers, some police officials suggested these incidents could have been authorized by consent. Yet this possibility itself calls attention to the control that existing law fails to maintain over police activity in this area. By obtaining consent to perform searches in such cases, peace officers in effect blur the distinction between those searches for which justification exists, and those for which it does not.

G. Constitutional Problems

233. The enactment of section 8 of the *Canadian Charter of Rights and Freedoms* raises the possibility that a number of existing crime-related search and seizure powers are unconstitutional. The proposition must remain largely speculative until section 8 has received definitive judicial interpretation. However, by any standard, the security against "unreasonable search or seizure" seems to imply the constitutional necessity of certain basic safeguards.[281] These include the prerequisite of "reasonable" basis of belief before an entry onto private domains or a personal search is commenced, and the limitation of forceful actions during the course of the search to those which are reasonable.

234. In fact, a number of existing provisions for search and seizure do not include such safeguards. As was noted earlier,[282] peace officers may search any persons found in premises entered pursuant to *Narcotic Control Act* and *Food and Drugs Act* provisions, regardless of the presence or absence of reasonable grounds linking these persons to a relevant offence. Moreover, the use of force to break doors or containers in pursuit of narcotics and drugs investigations is unconstrained by any standard of reasonableness.[283] Although one could view such departures from the constitutional standard as an issue to be resolved exclusively by the courts, we do not accept this view. Rather, we view these departures as problems in the existing regimes that deserve to be rectified.

235. Beyond the matter of powers that are themselves unconstitutional, there is the matter of the exercise of powers in an unconstitutional way. As we explained earlier, there is little likelihood that formal and technical breaches of procedural rules by a peace officer would be found to violate section 8.[284] On the other hand, the section might well catch instances of the search warrants being issued without reasonable grounds of belief. If section 8 is given such application, then there is an added significance to the proportion of warrants studied in our survey that failed to meet the "reasonable grounds" requirement.[285] If these warrants were issued on the same basis today, they would be unconstitutional as well as invalid.

236. In addition to searches and seizures with warrant, section 8 may also impugn the validity of warrantless street search activities. This would not be true of street searches conducted as an incident of arrest or on reasonable grounds for belief pertaining to the concealment of incriminating objects on the person concerned. However, it might cover activities such as the "random searches" for narcotics or drugs observed in a number of Canadian jurisdictions,[286] or the non-consensual stopping of individuals on an exploratory basis to ascertain whether or not a crime has been committed or a threat of disorder exists. A peace officer interviewed by a Commission researcher defended such supervisory activities at late hours with the comment, "[i]f it's on the street after two a.m. and moving, I want to know about it". Insofar as "knowing about it" entails an intrusive search and seizure, section 8 might well have a limiting effect.

II. Conclusion

237. The preceding observations lead us to believe that there is little doubt that the law governing crime-related searches and seizures needs to be reformed. The significant question is How? While some aspects of search warrant procedure have been highlighted, the paper so far has concentrated on the general picture. In order to propose specific changes, it is necessary to examine the individual components of search warrant laws in more detail. Part Two is devoted primarily to this task.

Endnotes

1. *Criminal Code*, R.S.C. 1970, c. C-34.

2. In referring to warrants under the *Narcotic Control Act*, R.S.C. 1970, c. N-1 and the *Food and Drugs Act*, R.S.C. 1970, c. F-27, as "crime-related", we do not dispute the constitutional basis of the decision in *R.* v. *Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.). Our position in this respect is outlined in the text, *supra*, para. 98.

3. *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 260; *Canada Temperance Act*, R.S.C. 1970, c. T-5, s. 137; *Excise Act*, R.S.C. 1970, c. E-12, s. 72; *Fugitive Offenders Act*, R.S.C. 1970, c. F-32, s. 19; *Game Export Act*, R.S.C. 1970, c. G-1, s. 7; *Importation of Intoxicating Liquors Act*, R.S.C. 1970, c. I-4, s. 7; *Indian Act*, R.S.C. 1970, c. I-6, s. 103(4); *Official Secrets Act*, R.S.C. 1970, c. O-3, s. 11; *Radio Act*, R.S.C. 1970, c. R-1, s. 10.

   In distinguishing between searches with and without warrant, this study has taken a narrow view of what qualifies as a warrant. Basically, unless a document incorporates all of the judiciality and particularity tests (set out in the course of this paper) that are characteristic of a warrant, it has not been so classified. Accordingly, a number of forms of written authority, such as authorizations issued pursuant to section 134 of the *Customs Act*, R.S.C. 1970, c. C-40, and subsection 231(4) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, have not been included in the above list.

4. These powers are the subject of the Law Reform Commission's pending study on regulatory search. Information was compiled in a preliminary, unpublished paper: Vicki Wong, "Search and Seizure Outside the Traditional Criminal Context" (1979).

5. Patrick Fitzgerald, "The Arrest of a Motor Car", [1965] Crim. L.R. 23, at p. 27.

6. In *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (N.S. S.C.), it was held that a peace officer had committed assault in exceeding the authority of a warrant to search premises by searching a person as well.

7. See, for example, *R.* v. *Richardson* (1924), 42 C.C.C. 95 (Sask. K.B.), and *R.* v. *Lauzon*, unreported, March 30, 1977 (Ont. Prov. Ct.).

8. *Universal Declaration of Human Rights*, G.A. Res. 217(iii) A, art. 12, U.N. Doc. A/810 at 71 (1948).

9. *Constitution Act, 1982*, s. 8 (hereinafter cited as the *Canadian Charter of Rights and Freedoms*).

10. See note 3, *supra*.

11. See the description of the entry of police officers in *Eccles* v. *Bourque, Simmonds and Wise* (1974), 27 C.R.N.S. 325 (S.C.C.). Until the reader is told that the purpose of the entry was to arrest a person, the description could as easily fit a search.

12. *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261, at p. 263.

13. *Ibid.*, p. 265. Although Thurlow J. was writing the dissent in the case, the majority (Urie J. and Smith D.J.) also analysed the incident as a search.

14. American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975), s. 210.1(1) (hereinafter cited as the *ALI Code*).

15. *ALI Code*, s. 210.1(2).

16. R. Thomas Farrar, "Aspects of Police Search and Seizure without Warrant in England and the United States" (1975), 29 U. Miami L. Rev. 491, at p. 493.

17. See text, *infra*, Part Two, paras. 55-63.

18. *R.* v. *Whitfield*, [1970] S.C.R. 46, at p. 48.

19. In *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.), it was held that "freezing" the occupants of premises was permissible in the course of searching the premises for narcotics.

20. *R.* v. *Colet* (1981), 57 C.C.C. (2d) 105 (S.C.C.).

21. *Criminal Code*, R.S.C. 1970, c. C-34, s. 445. See text, *infra*, Part Two, paras. 236-242.

22. *Entick* v. *Carrington* (1765), 19 St. Tr. 1029 (C.P.).

23. Seizure of "mere evidence" was not validated in America until *Warden, Maryland Penitentiary* v. *Hayden* (1966), 387 U.S. 294. The major initiative towards allowing common-law evidentiary searches and seizures in Great Britain was taken in *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.). A recommendation for statutory warrants to seize evidence under certain circumstances was made by the Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), p. 34 (hereinafter cited as the "RCCP Report").

24. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196, at p. 200 (Ont. H.C.).

25. In a self-reporting survey conducted by this Commission of searches with warrant in seven Canadian cities, at least one person was found in the premises in 90.4% of searches conducted with narcotics and drugs warrants, and 85.6% of searches conducted with other warrants. See note 262, *infra*, for details about the survey.

26. For an interesting discussion of liberalism and individual rights, see D. N. Weisstub and C. C. Gotlieb, *The Nature of Privacy* (Ottawa: Departments of Communications and Justice, 1972).

27. Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), p. 365.

28. See Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1.

29. *Berger* v. *New York* (1966), 388 U.S. 41.

30. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769), p. 169.

31. *ALI Code*, *supra*, note 14, p. 166.

32. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.23 is devoted to this objective.

33. See text, *infra*, Part Two, paras. 349-373.

34. *Canadian Charter of Rights and Freedoms*, s. 7.

35. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 1(*a*).

36. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 1.

37. *R.* v. *Ella Paint*, *supra*, note 6, at p. 175.

38. Whether or not the present wording of section 101, which covers searches for weapons in the "possession, custody and control" of a person permits personal search is a debatable question. See text, *infra*, Part Two, para. 433.

39. See text, *supra*, para. 81, and Lee Paikin, "The Standard of 'Reasonableness' in the Law of Search and Seizure", in *Criminal Procedure in Canada*, edited by Vincent M. Del Buono, (Toronto: Butterworths, 1982), pp. 93-124.

40. For an early English statutory power to seize dangerous weapons, see *An Act for Ordering the Forces in the Several Counties of this Kingdom*, 14 Car. 2, c. 3, s. 14.

41. *Laporte* v. *Laganière, J.S.P.* (1972), 18 C.R.N.S. 357 (Qué. Q.B.), at p. 369.

42. *Scott* v. *The Queen*, *supra*, note 12.

43. *R.* v. *Brezack* (1949), 96 C.C.C. 97 (Ont. C.A.), at p. 101.

44. *Reynen* v. *Antonenko* (1975), 20 C.C.C. (2d) 342 (Alta. S.C. T.D.).

45. *Criminal Code*, R.S.C. 1970, c. C-34, s. 237(2).

46. *Criminal Code*, R.S.C. 1970, c. C-34, s. 237(1)(*b*), and *Attorney General of Québec* v. *Bégin* (1955), 112 C.C.C. 209 (S.C.C.).

47. A Working Paper on Investigative Tests is currently being prepared for this Commission.

48. Royal Commission into Metropolitan Toronto Police Practices, *Report* (Toronto: 1976), p. 5 (hereinafter cited as the "Morand Report").

49. Albert Mayrand, *L'Inviolabilité de la personne humaine* (Montréal: Wilson & Lafleur, 1975), p. 94.

50. These instructions were cited, for example, in Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, *Report* (1975) (hereinafter cited as the "Pringle Report").

51. *Entick* v. *Carrington*, *supra*, note 22, at p. 1066.

52. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 Q.B. 299, at p. 319.

53. This idea was propounded most notably by the eighteenth-century theorist John Locke in his "Second Treatise of Government". See John Locke, *Two Treatises of Government* (New York: Cambridge University Press, 1960), p. 395.

54. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, ss. 6 and 8.

55. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Ont. Prov. Ct.).

56. See text, *supra*, para. 60.

57. A person may possess land as well as personal property. The warrant conceived by Hale was for "goods", however: see text, *supra*, para. 71. Accordingly, common law courts have consistently held that realty and its fixtures are exempt from seizure under a crime-related warrant. This exemption might appear to reflect common sense, if one conceives of seizure as a physical taking of an object. However, it cannot explain why in *R.* v. *Munn*, for example, the court held that a set of easily dislodged doors could not be seized under warrant: (1938), 71 C.C.C. 139 (P.E.I. S.C.).

58. Exceptions to this rule are found in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 445; *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(1)(*c*); *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 37(1)(*c*).

59. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(4).

60. Although five other provinces maintain legislation with prohibitions against certain defined trespasses, the two provinces with widely-applicable provisions are Ontario and Manitoba. See *The Petty Trespass Act*, R.S.M. 1970, c. P50, and *Trespass to Property Act*, R.S.O. 1980, c. 511.

61. Burns, *supra*, note 28, at p. 14.

62. Paul Freund, "Privacy: One Concept or Many" (1971), 13 Nomos 182, at p. 197.

63. Donald Madgewick, *Privacy under Attack* (London: Council for Civil Liberties, 1968), p. 2.

64. *Arkansas* v. *Sanders* (1979), 442 U.S. 753, at p. 761.

65. See text, *infra*, Part Two, paras. 146-150.

66. *Silverman* v. *United States* (1961), 365 U.S. 505, at p. 511.

67. *Semayne's Case* (1603), 5 Co. Rep. 91a (K.B.). Most recently, this case was cited in *R.* v. *Colet*, *supra*, note 20.

68. *Dorman* v. *United States* (1970), 435 F.2d 385 (D.C. Cir.).

69. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C. S.C.).

70. This question was raised but not answered by the Ontario Court of Appeal in *Re Pink Triangle Press and The Queen* (1978), 2 W.C.B. 228 (Ont. H.C.), approved May 2, 1978 (Ont. C.A.).

71. See text, *supra*, paras. 153-155, 169-170.

72. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. C.A.).

73. Data from the Commission's survey of searches with warrant indicate that the searches ranged from one minute to seven hours in length; the average time reported was fifty-three minutes. See note 262, *infra*.

74. Timothy G. Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law* (Ontario: Commission on Freedom of Information and Individual Privacy, 1979), p. 156.

75. See the dissenting opinion of Douglas J. in *Warden, Maryland Penitentiary* v. *Hayden*, *supra*, note 23.

76. See text, *infra*, Part Two, paras. 339-348.

77. See text, *supra*, paras. 34-37.

78. George Orwell, *Nineteen Eighty-Four* (London: Secker & Warburg, 1949). For a reference to this book in an established work on privacy, see, for example, John Shattuck, *Rights of Privacy* (Skokie: National Textbook Co., 1977), pp. 23-24.

79. *Victoria Park Racing* v. *Taylor* (1937), 58 C.L.R. 479 (Aust. H.C.).

80. *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345.

81. See Brown, *supra*, note 74, pp. 184-189.

82. *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 52(2). Protection of personal information is now covered by the *Privacy Act*, S.C. 1980-81-82, c. 111, Sch. II, s. 8.

83. S.C. 1980-81-82, c. 111, Sch. II, s. 8(2)(*c*) and (*e*).

84. *Report of the Commission of Inquiry into the Confidentiality of Health Information*, vol. I (Toronto: Queen's Printer for Ontario, 1980), p. 16.

85. See, for example, the discussion of release of information about a search or seizure, *infra*, Part Two, paras. 299-321.

86. Charles Sweet, *A Dictionary of English Law* (London: Henry Sweet, 1882), p. 876.

87. See text, *supra*, paras. 80-83.

88. See J. P. Kenyon, *The Stuart Constitution, 1603-1688* (Cambridge: Cambridge University Press, 1966), pp. 492-497.

89. See F. W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), p. 233.

90. Farrar, *supra*, note 16, p. 502n.

91. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II (London: Gyles, Woodward & Davis, 1736), p. 113.

92. The warrant survey conducted by the Commission did not disclose any incidents of privately laid informations among the 2,230 returns made. However, the methodology of the study was primarily geared to police search and seizure activity. See *infra*, note 262.

93. An example of a police force responsible to a Cabinet minister is the Constabulary Force of Newfoundland; see *The Constabulary Act*, R.S.N. 1970, c. 58, s. 5. Municipal forces in British Columbia, by contrast, are responsible to boards established under the legislation: *The Police Act*, R.S.B.C. 1979, c. 331, s. 19. The third model, that of control by the municipal council itself, is followed in Manitoba: *The Municipal Act*, S.M. 1970, c. 100, ss. 285 and 286.

94. *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.), at p. 5.

95. Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: E. & R. Brooke, 1797), pp. 176-177.

96. Hale, *supra*, note 91, p. 150.

97. *MacIntyre* v. *Attorney General of Nova Scotia* (1982), 40 N.R. 181 (S.C.C.), at p. 185, *per* Dickson J.

98. See text, *supra*, paras. 213-222.

99. J. Pollock, *The Popish Plot* (1903), cited in Farrar, *supra*, note 16, at p. 552.

100. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.), at p. 489.

101. *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645, at p. 651.

102. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.), at p. 266.

103. Hale, *supra*, note 91, p. 150.

104. See text, *supra*, para. 55.

105. See Paikin, "Standards of 'Reasonableness' ", *supra*, note 39.

106. See text, *supra*, paras. 126-128.

107. *Johnson* v. *United States* (1948), 333 U.S. 10, at pp. 13-14.

108. See text, *infra*, Part Two, paras. 35-38.

109. See, for example, John Faulkner, "Writs of Assistance in Canada" (1971), 9 Alta. L. Rev. 386.

110. See, for example, E. W. Trasewick, "Search Warrants and Writs of Assistance" (1962), 5 Crim. L.Q. 341, at p. 345.

111. *An Act for Preventing Frauds and Regulating Abuses in Her Majesty's Customs*, 13 & 14 Car. 2, c. 11, s. 5(2).

112. Much of the factual material about the customs writ in this paper has been gleaned from M. H. Smith, *The Writs of Assistance Case* (Berkeley: University of California Press, 1978).

113. *Ibid.*, pp. 38-39.

114. The calligrapher was the King's remembrancer, an official in the Court of Exchequer. See Smith, *supra*, note 112, at p. 35.

115. See note 111, *supra*.

116. See, for example, *Entick* v. *Carrington*, *supra*, note 22, at p. 1069, and *Huckle* v. *Money* (1763), 2 Wils. K.B. 206 (K.B.), at pp. 206-207.

117. *Paxton's Case* (1761), as published in Samuel M. Quincy ed., *Reports of Cases argued and adjudged in the Superior Court of the Province of Massachusetts Bay, between 1761 and 1772 by Josiah Quincy, Junior* (Boston, 1865). In a letter of March 29, 1817, Adams wrote to William Tudor, "Then and there the child Independance was born";

see C. F. Adams, ed., *Life and Works of John Adams*, vol. 10 (Boston: 1856), p. 248.

118. See the *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10; *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 37; *Customs Act*, R.S.C. 1970, c. C-40, s. 145; *Excise Act*, R.S.C. 1970, c. E-12, s. 78.

119. See, for example, *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (Qué. S.C.).

120. *Excise Act*, R.S.C. 1970, c. E-12, s. 79.

121. *Re Writs of Assistance*, *supra*, note 101, at pp. 651-652.

122. Recent R.C.M.P. operational manuals have instructed officers holding writs not to use the writ at the request of another police department unless the R.C.M.P. officer is in charge of the search.

123. Faulkner, *supra*, note 109, at p. 393.

124. Department of Justice Press Release, April 6, 1978.

125. *R.* v. *Hauser*, *supra*, note 2.

126. We do not include in our analysis the regulatory powers of inspection conferred on inspectors under subsection 22(1) of the *Food and Drugs Act*, R.S.C. 1970, c. F-27.

127. Search powers related to motor vehicles may be found in the following provincial liquor legislation: R.S.B.C. 1979, c. 237, s. 67; R.S.A. 1980, c. L-17, s. 115; R.S.S. 1978, c. L-18, s. 131; R.S.M. 1970, c. L160, s. 248; R.S.O. 1980, c. 244, s. 48(2); R.S.N.B. 1973, c. L-10, ss. 163, 165; R.S.N.S. 1967, c. 169, s. 126; R.S.P.E.I. 1974, c. L-17, s. 60; S.N. 1973, c. 103, s. 93.

128. The practice of using provincial powers to stop vehicles for criminal law enforcement purposes does not seem to be in dispute. It was described to Commission researchers by peace officers in various forces across Canada. For a published account of this practice, see Richard V. Ericson, *Reproducing Order* (Toronto: University of Toronto Press, 1982), p. 84.

129. Much of the analysis here has been advanced in Paikin, "Standards of 'Reasonableness' ", *supra*, note 39.

130. See, for example, Paul Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307.

131. Paul Weiler, *In the Last Resort* (Toronto: Carswell, 1974), p. 165.

132. *R.* v. *Drybones*, [1970] S.C.R. 282.

133. *Curr* v. *The Queen*, [1972] S.C.R. 889, at p. 899, *per* Laskin J.

134. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

135. *Payton* v. *New York* (1980), 445 U.S. 573.

136. See text, *infra*, Part Two, paras. 443-468.

137. *Wah Kie* v. *Cuddy (No. 2)*, *supra*, note 72, and *Levitz* v. *Ryan*, *supra*, note 19.

138. P. Devlin, *The Criminal Prosecution in England*, rev. ed. (London: Oxford University Press, 1960).

139. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, at pp. 454-455.

140. See, for example, *Re Worrall*, *supra*, note 94.

141. *R.* v. *Corrier* (1972), 7 C.C.C. (2d) 461 (N.B. S.C. A.D.).

142. *Ghani* v. *Jones*, *supra*, note 23.

143. See, for example, *Jeffrey* v. *Black*, [1978] Q.B. 490 (D.C.) and subsequent comment on the decision: (1978), 37 Camb. L.J. 200.

144. RCCP Report, *supra*, note 23, at p. 33.

145. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (Alta. S.C. A.D.), at pp. 301-302.

146. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II, *supra*, note 91, p. 94.

147. *An act for more effectually discouraging and preventing the stealing, and the buying, and receiving of stolen lead, iron, copper, brass, dell-metal, and solder, and for more effectually bringing the offenders to justice*, 29 Geo. 2, c. 30, s. 3.

148. *R.* v. *O'Donnell* (1835), 7 Car. & P. 138, 173 E.R. 61 (N.P.).

149. *Bessell* v. *Wilson* (1853), 20 L.T.O.S. 233 (Q.B.).

150. *Leigh* v. *Cole* (1853), 6 Cox C.C. 329, at p. 332.

151. *Corpus Juris*, Vol. 5 (New York: American Law Books Co., 1916), p. 434.

152. *Gottschalk* v. *Hutton*, *supra*, note 145; *Reynen* v. *Antonenko*, *supra*, note 44.

153. *R.* v. *Brezack*, *supra*, note 43, at p. 75.

154. *R.* v. *Whitfield*, *supra*, note 18.

155. *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, s. 41(2), as amended by SOR/80-462.

156. *Reynen* v. *Antonenko*, *supra*, note 44, at pp. 348-349.

157. *R.* v. *McDonald*; *R.* v. *Hunter* (1932), 59 C.C.C. 56 (Alta. S.C. A.D.).

158. *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 62 (hereinafter cited as the "Ouimet Report").

159. The R.C.M.P. has itself offered an interpretation of the governing law in its operational manuals. According to a recent guideline, the power to search areas within the person's control is limited to the person's immediate surroundings, *i.e.*, the room in which he is arrested.

160. *Jeffrey* v. *Black*, *supra*, note 143.

161. See text, *supra*, para. 118.

162. *R.* v. *McDonald*, *supra*, note 157.

163. *Smith* v. *Baker*, [1891] A.C. 325 (H.L.), at p. 360.

164. A recent example of this approach by a court, although not specifically a consent search case, is the Ontario Court of Appeal decision in *R.* v. *Dedman* (1981), 32 O.R. (2d) 641, in which it was held that a motorist stopping his vehicle pursuant to a policeman's signal to pull over was acting voluntarily. In effect, the Court analysed the peace officer's signal not as a use of coercive police powers but rather as an exercise of the officer's own legal liberty to perform the non-intrusive act of requesting the motorist's compliance.

165. *Reynen* v. *Antonenko*, *supra*, note 44.

166. Ouimet Report, *supra*, note 158, p. 59.

167. *Thomas* v. *Sawkins*, [1935] 2 K.B. 249 (C.A.).

168. *Carpenter* v. *McDonald* (1978), 4 C.R. (3d) 311 (Ont. Dist. Ct.).

169. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques and Michael McAuley, *Evaluation of the Canadian Gun Control Legislation: First Progress Report* (Ottawa: Supply and Services, 1981), p. 129.

170. *Entick* v. *Carrington*, *supra*, note 22.

171. See Maitland, *supra*, note 89, p. 302.

172. For example, the earliest statutory search warrant for weapons was included in a general national security package that included provisions for training and supplying troops, investigating breaches of military duty, and punishing offenders. See 14 Car. 2, c. 3, s. 14, *supra*, note 40.

173. Charles Hilchin, *A True Discovery of the Conduct of Receivers and Thief Takers in and about the City of London ...* (1718), p. 7.

174. While the amalgam may have been as diverse, however, there was some tendency in pre-Confederation legislation to generalize powers beyond the narrow limits of their British antecedents. A provincial Canadian justice of the peace, for example, unlike his British

counterpart, could issue a warrant for any "property on or in respect to which *any* offence" had been committed: C.S.C. 1859, c. 99, s. 2. And with the need to assimilate the various provincial criminal procedure enactments upon Confederation came some effort towards consolidation, although this trend occurred despite the professed affection of Canadian parliamentarians for the compartmentalized approach of English legislation. Sir John A. Macdonald, introducing an assortment of criminal law bills to the First Session of Parliament, stated that he "had adopted the principle of separate Bills rather than a code for various reasons, one obviously being that in case any particular statute were materially altered it would be more convenient to repeal it *in toto* and re-enact it than make gaps in any code. Following the English system, therefore, they had been divided into separate Bills." See *House of Commons Debates*, 1867-68, First Session, First Parliament, April 1, 1868, p. 442.

175. Crime-related search warrant provisions, for example, may be found in the following: *Betting, Gaming and Lotteries Act, 1963*, (U.K.), 1963, c. 2, s. 51; *Coinage Offences Act, 1936*, 26 Geo. 5 & 1 Edw. 8, c. 16, s. 11(3) (U.K.); *Firearms Act 1968*, (U.K.), 1968, c. 27, s. 46; *Obscene Publications Act, 1959*, 7 & 8 Eliz. 2, c. 66, s. 3 (U.K.); *Sexual Offences Act, 1956*, 4 & 5 Eliz. 2, c. 69, s. 43 (U.K.); *Theft Act 1968*, (U.K.), 1968, c. 60, s. 26.

    Powers of search with warrant for evidence would be generalized somewhat according to the recommendations advanced by the Royal Commission on Criminal Procedure in its Report, *supra*, note 23. See further the background study by the RCCP, *The Investigation and Prosecution of Criminal Offences in England and Wales*, Cmnd. 8092-1 (1981), pp. 108-118.

176. See text, *supra*, paras. 132-133.

177. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (Ont. Div. Ct.), at p. 521.

178. *Re R. and Johnson & Franklin Wholesale Distributors* (1971), 3 C.C.C. (2d) 484 (B.C. C.A.), at p. 489.

179. Hale, *supra*, note 91, at pp. 113-114; *Fanning* v. *Gough* (1908), 18 C.C.C. 66 (P.E.I. S.C. *in banco*). See, *infra*, Part Two, paras. 220-224.

180. Hale, *supra*, note 91, p. 150.

181. *R.* v. *Execu-Clean Ltd.*, unreported, January 30, 1980 (Ont. H.C.).

182. *House of Commons Debates*, 1953-54, vol. III, First Session, Twenty-second Parliament, February 26, 1954, p. 2516 and March 9, 1954, p. 2826.

183. *Norland Denture Clinics Ltd.* v. *Carter* (1968), 5 C.R.N.S. 93 (Sask. Q.B.).

184. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 27(2).

185. See, for example, *Re Abou-Assale and Pollack and The Queen* (1978), 39 C.C.C. (2d) 546 (Qué. S.C.); *contra* see *Re McAvoy* (1970), 12 C.R.N.S. 56 (N.W.T. Terr. Ct.).

186. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

187. Leon Radzinowicz, *A History of English Criminal Law*, vol. II (London: Stevens and Sons, 1956), p. 3.

188. *An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds and other idle and disorderly Persons, and to Houses of Correction*, 17 Geo 2, c. 5, s. 6.; *An Act for the better preventing Thefts and Robberies, and for regulating Places of Publick Entertainment, and punishing Persons Keeping disorderly Houses*, 25 Geo 2, c. 36, s. 12.

189. *Vagrants Act*, S.C. 1869, c. 28, s. 2.

190. *An Act for suppressing Gaming Houses, and to punish the keepers thereof*, S.C. 1875, c. 41, s. 1.

191. *Gaming House Act*, 17 & 18 Vict., c. 38, s. 5.

192. Bill C-53, 1980-81, containing proposals to amend the *Criminal Code* in relation to sexual matters is before Parliament. Section 11 of the proposed legislation would repeal section 183. Since the legislation has not yet been enacted, this study deals with section 183 as current law. [Ed. note: Section 11 of Bill C-53 was passed by the House of Commons. See S.C. 1980-81-82, c. 125, s. 12.]

193. *Metropolitan Police Courts Act*, 2 & 3 Vict., c. 71, s. 48.

194. *Gaming Act*, 8 & 9 Vict., c. 109, s. 6.

195. See *House of Commons Debates*, 1953-54, vol. III. First Session, Twenty-second Parliament, February 24, 1954, pp. 2409-2413. The present section 181 was approved in Committee without comment.

196. *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, [1964] 3 C.C.C. 82 (B.C. S.C.).

197. *R.* v. *Chew* (1964), 44 C.R. 145 (Ont. S.C.), at p. 149.

198. As explained in note 192, *supra*, legislation in relation to sexual offences is before Parliament. Section 182 would be repealed by section 11 of this draft legislation. [Ed. note: See S.C. 1980-81-82, c. 125, s. 12.]

199. See Vern and Bonnie Bullough, *Prostitution: An Illustrated Social History* (New York: Crown Publishers, 1978), pp. 241-253.

200. It is of historical note that this anti-exploitation legislation was bound up with Victorian prohibitions against homosexuality and sexual

activity between minors. When Canada purported to follow the British model in 1886, anti-exploitation provisions were again combined with these same prohibitions. See *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157.

201. This is in fact supported by the present title given to section 183 of the *Criminal Code*: "Examination of Persons Arrested in Disorderly Houses". See *Martin's Annual Criminal Code 1981* (Aurora: Canada Law Book Ltd., 1981), p. 185.

202. All references to narcotic control legislation, unless otherwise noted, pertain to the *Narcotic Control Act*, R.S.C. 1970, c. N-1.

203. Bruce A. MacFarlane, *Drug Offences in Canada* (Toronto: Canada Law Book Ltd., 1979), pp. 19-28.

204. Emily Murphy (writing as "Janey Canuck"), *The Black Candle* (Toronto: Thomas Allen, 1922), pp. 332-333. See MacFarlane, *supra*, note 203, pp. 23-24, for background information about Judge Murphy's polemic.

205. *House of Commons Debates*, 1953-54, vol. V, First Session, Twenty-second Parliament, June 1, 1954, p. 5312.

206. *The Opium and Drug Act*, S.C. 1911, c. 17, s. 7.

207. *The Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22, s. 18.

208. *The Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, s. 22.

209. *An Act to amend the Food and Drugs Act*, S.C. 1960-61, c. 37, ss. 1 and 36.

210. See, for example, *Re R. and Kellet* (1973), 14 C.C.C. (2d) 4 (Ont. C.A.).

211. *R.* v. *Jaagusta*, [1974] 3 W.W.R. 766.

212. *Ibid.*, p. 768.

213. See, for example, *R.* v. *Erikson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.).

214. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).

215. For a discussion of obscenity provisions, see Law Reform Commission of Canada, *Study Paper on Obscenity* (December, 1972), p. 66 (copy available in Commission library).

216. *House of Commons Debates*, 1959, vol. V, Second Session, Twenty-fourth Parliament, July 6, 1959, p. 5547.

217. *Ibid.*

218. *Obscene Publications Act*, 7 & 8 Eliz. 2, c. 66, s. 3. The antecedent legislation was 20 & 21 Vict., c. 83, s. 1.

219. See note 216, *supra*, p. 5548.

220. *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966), p. 12.

221. *Ibid.*, p. 71.

222. See, for example, *An Act Respecting the Seizure of Arms Kept for Dangerous Purposes*, R.S.C. 1886, c. 149, s. 2. An exception to the warrant requirement did exist, however, in the case of searches for weapons taken to public meetings. See *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 113.

223. *House of Commons Debates*, 1912-13, vol. V, Second Session, Twelfth Parliament, May 16, 1913, pp. 10070-10071.

224. *Criminal Code*, S.C. 1953-54, c. 51, s. 96.

225. *Criminal Code*, R.S.C. 1970, c. C-34, s. 99(2).

226. See, *ALI Code*, *supra*, note 14, s. 110.2(1)(*a*).

227. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 Crim. L.Q. 29.

228. *An Act to amend the Criminal Code*, S.C. 1938, c. 44, s. 9.

229. *First Progress Report*, *supra*, note 169, pp. 127-128.

230. *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 6. The relevant search warrant provision, introduced as section 98G in this statute, became section 105 in the 1970 revision of the *Criminal Code*.

231. See the *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, First Session, Twenty-eighth Parliament, March 6, 1969, p. 206.

232. *R.* v. *Colet*, *supra*, note 20.

233. See, for example, the testimony of then Solicitor General Warren Allmand: *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirtieth Parliament, April 27, 1976, p. 39:50.

234. See text, *infra*, Part Two, para. 423. Some police forces appear to take the position that section 101 does not authorize the search of a person. While this interpretation by the police demonstrates commendable self-restraint, it does not seem to be required by the wording of the section, which refers to rights to seize weapons in the person's "possession, custody or control".

235. *Larceny Act*, S.C. 1869, c. 21, ss. 30-33.

236. *An Act respecting the marking of Timber*, S.C. 1870, c. 36.

237. *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 572.

238. *An Act for the more effectual Prevention of Cruelty to Animals*, 12 & 13 Vict., c. 92.

239. *Cruelty to Animals Act*, S.C. 1869, c. 27.

240. *House of Commons Debates*, 1925, vol. IV, Fourth Session, Fourteenth Parliament, June 8, 1925, p. 4004.

241. Law Reform Commission of Canada, *Our Criminal Law* [Report to Parliament] (Ottawa: Supply and Services, 1976), pp. 36-37.

242. *Re Goodbaum and The Queen*, *supra*, note 186.

243. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (P.E.I. S.C.).

244. See note 262, *infra*.

245. Problems dealing with financial accounts are discussed *infra*, Part Two, paras. 62-63.

246. Problems relating to computer information as the subject matter of a theft are not addressed specifically in this paper. Recommendations 1 and 2, (Part Two) however, would allow the seizure of stored information that represented "takings of an offence".

247. Law Reform Commission of Canada, *Theft and Fraud* [Working Paper 19] (Ottawa: Supply and Services, 1977), pp. 37-48.

248. The *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93 expanded what is now section 312 of the *Criminal Code*, R.S.C. 1970, c. C-34, to cover "any property ... or any proceeds of any property" obtained contrary to its provisions.

249. The Law Reform Commission has recommended the reconsideration of gaming offences. See *Our Criminal Law*, *supra*, note 241, p. 35.

250. RCCP Report, *supra*, note 23, p. 34.

251. Inspector J. W. Cooley, "The Social Aspect of Crime Prevention" (1978), 2 Can. Police C.J. 382, at p. 386.

252. See text, *supra*, para. 83.

253. See, *First Progress Report*, *supra*, note 169, p. 130.

254. *R.* v. *Colet*, *supra*, note 20.

255. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 148.

256. See text, *infra*, paras. 229-232.

257. As part of its programme of empirical studies, the Commission studied writ usage over a four-month period in seven Canadian cities: Edmonton, Montréal, Toronto, Winnipeg and Vancouver (all of which reported some writ usage) and Fredericton and Saint John (which reported none). The writs of assistance study will be published and released separately from this paper. The "urgency" figure cited in the text actually comprises four categories of response to a self-reporting questionnaire completed by writ users. These categories were: "unspecified urgency" (32.7%), "urgency — to prevent destruction or removal of evidence" (40%), "urgency — safety of police in jeopardy" (0.6%) and "urgency — to prevent harm from contaminated drugs or liquor" (0.6%). The writs covered included those under the *Customs Act*, R.S.C. 1970, c. C-40, and the *Excise Act*, R.S.C. 1970, c. E-12, as well as narcotics and drugs legislation.

258. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirty-second Parliament, November 26, 1981, p. 56:25.

259. See *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 11. The question of entry to effect arrest is again before the Supreme Court of Canada in *R.* v. *Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.).

260. See note 257, *supra*.

261. See text, *supra*, para. 83.

262. The survey's strategy, methodology and results have been presented in consultation documents prepared for five of the seven cities surveyed. At present, a documentary account of the survey as a whole is being prepared. Each of the studies was of four months' duration and sought to bring together, on a transaction-by-transaction basis, every search warrant issued during the period of the study, the written application, information or report prepared to obtain it, and a questionnaire completed by the police officer who executed the warrant. A total of 2,219 cases of warrant issuance were reported; 1,869 of these warrants were reported as having been executed. Of the *executed* warrants, 1,245 were issued under section 443, 91 under section 181, and 479 under *Narcotic Control Act* and *Food and Drugs Act* provisions; the remainder were issued under an assortment of other provisions and statutes, e.g., the *Customs Act*, etc.

Following the completion of the surveys, the documents received were subjected to two different types of evaluation. First, data from both the warrant documents and the questionnaires were submitted to analysis by computer. This analysis focused primarily on the execution of the search, including details about the executor, the time of execution, the scope of search and the nature of items seized.

Second, a stratified random sample of 236 sets of documents was selected from the larger total of 2,219 and divided up among a panel of judges from appellate and superior courts across Canada. Each panellist evaluated the legality of the documents presented to him and then discussed his findings with the other panellists at a conference organized by the Commission.

263. The problems of incompleteness and obscured portions that produced "unknown" evaluations may have represented not defects in the documents as originally presented to the warrant issuer, but rather problems in the reproduction or collection of these documents for the Commission researchers. Accordingly, one could not make a negative assessment of the application or warrant in question simply by virtue of the incompleteness or illegibility. If no other defect appeared in the documents, and the evaluator felt incapable of making a final assessment due to the problem, the evaluation was noted as "unknown".

264. See text, *infra*, Part Two, paras. 225-226.

265. See text, *supra*, paras. 74-77.

266. Due to incomplete documentation, 2% of the 250 sets of documents analysed by our judicial panel could not be conclusively evaluated.

267. Since it seems that the wording of section 181 does not require a warrant issued under that provision to specify any objects to be seized, no attempt was made to compare objects seized to objects named on the warrant. Rather, for the purpose of this tabulation, all seizures made in connection with section 181 warrants were treated as if the objects seized had been named on the warrant.

268. The ratio of seizures of specified items to non-specified items was 2.4:1 under valid warrants and 2:1 under invalid warrants.

269. Because the samples received from Fredericton and Saint John were small, it would be misleading to present figures for these cities separately. Of eleven warrants issued in both cities, three (27%) were valid.

270. See text *infra*, Part Two, para. 174.

271. Ericson, *Making Crime*, *supra*, note 255, pp. 153-154. While some suggestion was made (*ibid.*, p. 232) that apparently offensive police actions were carried out solely as "practical jokes" on the researcher, this does not appear to pertain specifically to the two cited cases.

272. David Humphrey, "Abuse of Their Powers by the Police", in Law Society of Upper Canada, Special Lectures, 1979, *The Abuse of Power and the Role of An Independent Judicial System in Its Regulation and Control* (Toronto: Richard de Boo Ltd., 1979), pp. 565-566.

273. The warrant was identified as a "commercial crime warrant" if it either (i) pertained to a fraud or an offer of a secret commission (*Criminal Code*, R.S.C. 1970, c. C-34, s. 383) or a conspiracy to commit one of these offences, or (ii) was obtained by a "commercial crime squad" of a police force. A total of sixteen such warrants were identified in Vancouver and eleven (69%) were found to be valid by the judicial panel.

274. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 97.

275. See J. Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice" (1959-60), 69 Yale Law Journal 543, and Ericson, *Making Crime*, *supra*, note 255, p. 11.

276. Ericson, *Reproducing Order*, *supra*, note 128, p. 148.

277. Richard V. Ericson and Patricia M. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process* (Toronto: University of Toronto Press, 1982), pp. 46-49.

278. See text, *supra*, para. 208.

279. Ericson, *Making Crime*, *supra*, note 255, p. 148.

280. This self-reporting survey was integrated with the collection and analysis of documents in the warrant survey. See note 262, *supra*.

281. See text, *supra*, paras. 101-109.

282. See text, *supra*, para. 160.

283. See text, *infra*, Part Two, para. 246.

284. See text, *supra*, para. 112.

285. See text, *supra*, para. 215.

286. See, for example, the discussion of random searches in Edmonton in Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 Chitty's Law Journal 199.

PART TWO:

DEVELOPING A NEW REGIME

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CHAPTER FOUR

The Approach to Reform

I. Limits of Law Reform

1. The focus of this Working Paper is the reform of legal rules governing crime-related powers of search and seizure. This focus both reflects and entails the acceptance of certain limitations. Among these is the jurisdictional limitation discussed earlier: the recognition that legal powers under provincial as well as federal legislation are used by peace officers to enforce the criminal law.[1] Other limitations upon our task bear on the relationship between procedural law and criminal law enforcement practice. We recognize that there is a point at which rules of criminal procedure must allow for the disparate influences of the institutions and localities by, and in which, the criminal law is enforced. And we must also take account of the limited value offered by legal reform in itself as a solution to problems of police practice.

A. Disparate Influences

2. Rules of criminal procedure aim in part to standardize the practices they govern. The extent to which the standardizing impulse is carried in a particular regime is reflected in the detail to which these rules are reduced. It would be possible to devise a set of rules governing crime-related powers of search and seizure so thorough that if put into practice, they would make uniform, say, the fine print

on an inventory of items seized from Bonavista, Newfoundland to Vancouver, British Columbia. We believe, however, that such a set of rules would be undesirable, for it would be insensitive to the legitimate influences that various institutions and localities bring to the enforcement of criminal law.

3. Policing in Canada is organized and maintained at federal, provincial and municipal levels. This complex situation reflects constitutional allocations of jurisdiction. On the one hand, law enforcement within each province has been viewed primarily as a matter coming within the classification of "administration of justice", which is assigned to provincial legislatures under subsection 92(14) of the *Constitution Act, 1867*. As a result,

> each province has enacted legislation placing obligations for policing and the maintenance of law and order on local authorities, such as municipalities, and others. These obligations have then been discharged, in certain cases, by the creation of municipal and provincial police forces or, by contracting for the supply of policing services from the provincial police force (if there is one) or from the R.C.M.P.[2]

In addition to decisions respecting policing, subsection 92(14) gives the provinces responsibilities for the administration of the system of officials assigned the warrant issuing functions of justices of the peace.[3]

4. On the other hand are the responsibilities assumed by the Royal Canadian Mounted Police. As well as performing a contractual role in provincial policing, the R.C.M.P. fulfils certain responsibilities of a national character, including the enforcement of federal statutes other than the *Criminal Code*, the policing of the Northwest Territories and the Yukon, and the protection of national security.* Constitutional authority for these duties has been perceived to derive from the "peace, order and good government" clause in section 91 of the *Constitution Act, 1867*.

5. This state of different levels and structures of policing produces certain variations in practice, orientation and capability, which may reflect on the search and seizure activities carried out by a particular force. For example, the Royal Canadian Mounted Police has been associated with a distinct capability of policing sophisticated non-violent property crimes, an orientation that entails relatively frequent seizures of business records. Small local forces, on the other

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* Since this Working Paper was drafted, Bill C-157, which would significantly modify the role of the R.C.M.P. as regards national security, was introduced in Parliament.

hand, may be directed towards little more than a "watchman" function, using motor vehicle checks to monitor individuals within their jurisdictions.[4] Even when performing similar functions, the R.C.M.P. is often seen to be more technical and regulated in its approach than municipal forces.[5]

6. This assortment of policing structures complements other variables pertaining to the areas and communities within Canada in which criminal law and procedure are applied. The size, history and composition of the community served by a police force, and the patterns of criminal activity peculiar to it, all contribute significantly to the character of local law enforcement. On the question of community size, for example, the Task Force on Policing in Ontario observed that while there was evidence of a breakdown of communication between the police and individuals in larger centres, closer relationships were being maintained in smaller communities.[6] This state of relations affects the degree to which police feel it appropriate to resort to specific powers as opposed to less formal, consensual approaches. In interviews with police officers in various Canadian forces, Commission researchers were told of the increased likelihood of obtaining citizen co-operation in rural settings.

7. The delicate task in developing rules of search and seizure is to strike the correct balance of standardization. In exercising restraint in this regard, we do not diminish the importance of police accountability for law enforcement policies and activities; rather, we recognize that such accountability may be achieved at the institutional and local levels as well as through a federally imposed system of procedural rules. But even this limited position assumes that changing or imposing legal rules is meaningful in defining actual police practice. It is to this assumption that we now turn.

B. Legal Rules and Actual Practice

8. That legal rules do not necessarily govern the practice of law enforcement is hardly a controversial proposition. In the present context of search and seizure powers, we have already referred to the empirical studies which show widespread deviation from warrant standards,[7] and acknowledged that warrantless powers are difficult to monitor.[8] One might wonder accordingly whether changing the rules could have any meaningful impact on existing problems. In order to

address this issue, it is useful to consider certain aspects of the relationship between police powers and police practice.

9. Rules defining police powers have a specific function in Anglo-Canadian tradition — they set out exceptions to the ordinary prohibitions against intrusions upon an individual's person, private domain and possessions.[9] While this function is a critical one it is also in a sense quite modest. Our legal tradition does not purport to devise permissible enforcement strategies or define situations in which intrusions *should* be performed. Rather, it establishes when intrusions *may* be performed, by requiring that when law enforcement officers determine to pursue an investigation through an intrusive action, they justify the intrusion, obtain the proper authorization and perform it within the limits set down in the law.

10. Accordingly, it has been observed by social scientists that legal rules serve a secondary, "enabling" function:

> [A]ccording to legal ideas, the enforcement of the criminal law is supposed to be governed by the rule of law and the principle of legality....
>
> In practice, the system operates according to men who use laws to accomplish their enforcement tasks. The law is very enabling in this respect, because it is effectively formulated for the pragmatic use and benefit of law enforcement agents, allowing them to accomplish crime control in accordance with their organizational interests.[10]

That law enforcement personnel "use laws to accomplish their enforcement tasks" is not in itself an alarming notion. Indeed, so long as the law "used" by police in turn exerts control over their resort to intrusive conduct, the situation is quite consistent with the tradition of the rule of law. The problem begins if and when the law ceases to exert this control and becomes instead a set of rules with merely symbolic value.

11. How does procedural law, so to speak, lose its grip? A number of factors are relevant. Particularly in the case of warrantless powers, the application of rules is confided to police personnel whose experience and involvement in an investigation cannot be realistically separated from their decision-making tasks. Peace officers often advert to proceeding on "gut feelings" that defy quantification. Yet although the peace officer's frame of reference is instinctive, the law envisages him applying legal criteria, often elaborate in nature, to his decision to intrude.

12. Another problem resides in the inevitable gaps and conflicts in the factual pictures to which the law must be applied. Whether or

not a warrant is used, it is often difficult to be assured of achieving accurate conclusions as to the basis upon which, and the manner in which, the intrusion took place. As one commentator has observed:

> That otherwise honorable citizens resort to lying as a defense against police is well established. It is also clear that some police officers lie to justify action they have taken. The task of getting at the truth is further complicated because many of the people with whom the police have contact are unscrupulous individuals. Hard-core criminal offenders do not hesitate to make a false allegation if they think it might help to cloud the issue of their own guilt.[11]

Where the ambiguity or conflict in a factual picture relates to the application of a police power, effective review or monitoring of the power becomes difficult.

13. In practice, particularly at the search and seizure stage of an investigation, peace officers have considerable control over the factual pictures that determine the application of their legal powers. Detectives in particular work in conditions of "low visibility" to the outside world, and indeed other officials, such as superior officers and warrant-issuers, rely heavily on the investigator's account. Although recent developments have opened documentation from search warrant proceedings to public scrutiny and hence introduced higher visibility into these proceedings,[12] the facts that underline an investigation and, indeed, a consequent decision to apply for a search warrant inevitably will and must remain within the primary control of the police. This state of control admits the possibility of manipulation of facts and inferences to obtain the legal authorization for, or subsequent condonation of, intrusive police activity.

14. Finally, there is the fact that not only police strategies but also police objectives may be defined outside rules of criminal procedure. Just as the criminal law is sometimes enforced through the use of search and seizure powers in regulatory legislation, so too the powers afforded in criminal procedure are subject to use for the broader purposes of order maintenance, which are not strictly related to criminal law enforcement.[13] The resort to crime-related search powers to serve such purposes is as inevitable as the discretion built into these powers. Insofar as such purposes continue to inform the use of crime-related search and seizure powers, it is evident that reform of these powers will be of limited impact on police practice.

15. It would be naïve to expect that the tensions between law and practice would be completely resolved through alteration of the existing legal rules; to address these tensions comprehensively, one must delve into the administrative and policy structures governing

police work. But this does not make reform of the rules a worthless task. Even those commentators who have argued for an emphasis on extra-legal initiatives to address police discretion concede that there is merit in clearly defining the scope of the legal powers conferred upon the police.[14] Indeed, insofar as the legal rules are obsolete and confused, they may be perceived as inviting the disregard or manipulation they sometimes receive at the hands of the police.

16. Moreover, to concede that police practice inevitably will diverge from the law to some degree does not justify a refusal to strive to ensure that it complies with the law to the greatest extent possible. The ideal of a criminal law enforcement system in which agents of the State are confined to the exercise of powers accorded by law has been implicit in the traditional notion of the rule of law which pre-existed Canadian Confederation.[15] If this ideal model has not been attained, nevertheless it has served historically as a valuable goal for the participants in this system. That this goal is still a valid one is underlined by two provisions of the new *Canadian Charter of Rights and Freedoms* which have been already discussed: section 7, which articulates the right to liberty and security of the person, and section 8, which affords security against unreasonable search or seizure.[16] To assert the uncontrollability of police discretion by legal rules is to concede that these provisions, as well as the procedural rules for crime-related searches and seizures, are meaningless symbols. We neither make nor accept this concession.

II. Guidelines for Law Reform

A. Codification

17. The present law of search and seizure is complicated by the coexistence of common law and statutory sources of authority. We believe that it would be beneficial to move to a purely statutory scheme of law. This is not to suggest that the content of common-law rules ought to be discarded; rather, the intention is to incorporate those valuable policies and procedures presently found in the common law into a harmonious and coherent code of crime-related powers of search and seizure.

18. There are a number of reasons why extra-statutory powers ought not to be maintained. The first of these is the need for clarity. In its recent Report, the Royal Commission on Criminal Procedure examined search and seizure law in England and Wales and concluded:

> A principal theme of the evidence put to us has been the need to place on a rational basis and bring into line with modern conditions these procedures and practices, some of which date at least from the last century and in which anomalies are apparent. There is a consensus in favour of codification and rationalisation of the provisions.[17]

While Canada has not experienced problems of vague, expanded common law powers to the same degree as England, there is still a sufficient degree of uncertainty in some areas to justify taking a similar approach to that of the Royal Commission. For example, the permissible ambit of the search incidental to arrest, while generally conceded to extend to areas within the individual's control, remains undefined. And the parameters of common law "consent" search by the police — questions such as when it may be performed and what may be seized — have never been addressed thoroughly by Canadian courts.

19. The current situation regarding "consent" search also points to another problem with extra-statutory powers — the absence of generally applicable procedural safeguards. If it is accepted that certain conditions should be satisfied when the police request individuals to consent to infringements on their person, private domains or possessions, then it becomes useful to articulate these conditions in legislation. While it may be beneficial to allow procedures to be accommodated to differing local traditions and conditions, the present law goes much further than this; it permits individual police forces to decide whether the individual will be granted any measure of protection at all. Indeed, the absence of standard procedures is not only detrimental to the interests of individuals; some peace officers interviewed by Commission researchers were concerned that their tasks were made more difficult by the absence of clear guidelines.

20. In addition, some degree of significance should be attached to the introduction of constitutional protection against "unreasonable search and seizure".[18] While the fact that a search or seizure power is granted at common law does not render that power "unreasonable", it may admit a heightened potential for uncertainty as to the limitations governing the exercise of the power. This may be particularly the case where the power is a warrantless one; the removal of warrant

protections, which incorporate certain "reasonableness" features, may be perceived to create some onus to ensure that similar or substitute features are built into the warrantless power. The most effective context for meeting this onus is a statutory regime.

21. The advantages of codification have been expounded for the Law Reform Commission in considerable detail in a previous Study Paper, *Towards a Codification of Canadian Criminal Law*. The authors of the study concluded:

> Codification would thus enhance the two qualities that society looks for in the law: predictability and certainty. The lawyer who can refer to a code for guidance will find it easier to determine the impact of a particular law and to predict how the courts are likely to apply it in given cases. He will find that legal rules are not made rigid by codification, they simply become more precise and certain with greater opportunity for continuous adaptation to new conditions and society's changing needs.[19]

We conclude that these values apply to the law of search and seizure and that a codification in this area is therefore in order.

B. Simplification, Balance and Control

22. Precision and certainty would not be advanced much further by a codification if that codification remained as complex and mystifying as the system it replaced. A problem that has arisen in the American law of search and seizure is that some of the distinctions drawn by the courts between various fact situations are bewildering to judges, legal scholars and police officers alike. This has led the United States Supreme Court in some cases in recent years to favour the drawing of a "bright line" — a clear demarcation between legal and illegal activities of warrantless search and seizure.[20] Paradoxically, some of the "bright lines" that have been drawn are themselves quite elusive.[21] The importance of avoiding such entanglements in Canada may have become heightened by the prospect of augmented remedies for breach of constitutional rules offered by section 24 of the new *Canadian Charter of Rights and Freedoms*.

23. Aside from assisting specialists in the law enforcement system, simplification of the rules promotes the objective of enabling the individual affected to be informed of the peace officer's legal position. It is true that the achievement of this objective may be complicated by factors quite independent of the organization and nature of the legal rules; these factors were canvassed in a study

conducted for the Law Reform Commission of Canada entitled, *Access to the Law*. The study observed, however:

> Almost all the people we encountered at various information sources agreed that the major problems with the present form of statutes are their technical and convoluted language, the inadequate or non-existent indexing, their complex structure, and the difficulty in keeping track of recent amendments.[22]

Simplifying search and seizure procedures would address these problems at least in part.

24. The goal of simplification must inevitably be compromised, however, by the need to balance the interests at stake in the design of search and seizure powers and to take account of the variables that differentiate the situations which demand the exercise of these powers. These variables include the object of search (e.g., stolen property, narcotics), the subject of search (e.g., a person, place or vehicle), the urgency of the situation, the attitude of the individual affected, the seriousness of the offence under investigation, other particular circumstances of the case, the likely extent to which the particular provisions will be relied upon and the potential for abuse. If the goal of simplification cannot be permitted to suppress recognition of all of these variables, however, it may entail on occasion giving priority to some of them at the expense of others.

25. Informing the task of developing a new regime of rules is the paramount consideration of keeping the ambit and variety of the provisions controllable. The struggle to select and balance out the various relevant factors may be discerned in a number of recent law reform initiatives and codifications: the *Model Code of Pre-Arraignment Procedure* developed by the American Law Institute,[23] the *Criminal Investigation Bill* flowing from the recommendations of the Australian Law Reform Commission,[24] and the recommendations of the Royal Commission on Criminal Procedure in England.[25] The exact balance proposed in each case differs somewhat, but the need to prevent the sum of the individual powers from becoming unmanageable remains a common and paramount goal in all cases. This is our goal as well.

C. A Comprehensive Approach

26. One could approach the task of reforming crime-related search and seizure laws in two different ways. One could accept the

structure of the present rules as a basis, and move through the various aspects of existing procedures, discussing appropriate modifications along the way; or one could start from square one: not only changing the context of the rules where appropriate, but also organizing them into a new structure. This Working Paper takes the latter course, for to take the former is to concede to one of the basic problems with the existing rules — the structural incoherence of their arrangement.

27. The incoherence of the present state of the law has stemmed from the historical tendency to allow individual crime-related problems to dictate the adoption of individual procedures. This paper adopts a different approach: that procedural rules as an initial matter must cut across the distinctions between various offences and found themselves instead on factors relating to offences generally. This approach is implicit in most *Criminal Code* procedures from arrest to trial to appeal. There are not, for example, different arrest provisions for murder, drug possession, precious metals, fraud and firearms offences; there is rather a code of procedure that covers grounds for arrest without warrant (sections 449 and 450), the issuance of warrants (section 455.3), the laying of informations (sections 455 and 455.1) and post-arrest procedures (sections 451, 452 and 453). While distinctions are made between certain offences and classes of offenders, these distinctions derive not from historical particularization but from the need, within a set of general rules, to take account of such social interests as the need to protect the public and ensure the accused's attendance at trial.

28. There is no valid reason why search and seizure rules should not begin from such a general basis; indeed, the virtues of such an approach for warrant procedures were recognized somewhat when the present section 443 of the *Criminal Code* was enacted ninety years ago. But the usefulness of section 443 as an organizational framework for a general set of rules is limited. For one thing, it applies to searches with warrant only and thereby associates grounds for intrusion with a specific mode of authorization, an association we will shortly reject.[26] For another, the proliferation of special provisions since section 443 was enacted makes it somewhat misleading to view this section as the comprehensive warrant regime it once was. While still the broadest and most utilized of the warrant regimes, section 443 is essentially one of many. To develop a comprehensive set of rules, one must draw on all of the various grounds and procedures and not merely on section 443.

29. The adoption of a fresh structural approach does not entail a wholesale rejection of the present rules. On the contrary, these

rules and the policies underlying them are the obvious starting points in a discussion of what the content of the general rules ought to be. The approach taken in this paper basically brings these rules and policies into a central and accessible focus, where they can be evaluated effectively. Accordingly, in Chapters Five, Six and Seven, we develop a set of rules applicable to search and seizure generally. In Chapters Eight and Nine, we assess the legitimacy of departing from the general rules to meet the demands presented by special problems. Finally, in Chapter Ten, we address the apparent problem of the enforcement of procedural rules.

III. Underlying Premises

30. Before beginning the discussion of appropriate rules, it is useful to recognize and explain two premises upon which it is predicated. Firstly, this paper accepts that the question of the grounds upon which searches and seizures are justified is separate from, and prior to, that of the procedures by which they should be authorized. Secondly, it adopts the presumption that the only means of authorizing any search should be a warrant, unless it is shown that resort to the warrant is inappropriate.

A. Separating Justifications from Procedures

31. Under the present state of the law, grounds or justifications for intrusive searches and seizures are identified with their modes of authorization. One might speak, for example, of grounds for searching premises with warrant, comprehending within this description all of the grounds for obtaining warrants in the various statutory provisions discussed in the previous Chapter. To know the legal justifications for searches and seizures in general, one must piece together the grounds for search with warrant with the grounds for search under other procedural mechanisms. In fact, there is a considerable overlap between the justifications offered within the different procedural contexts. That these justifications are identified with their modes of authorization owes more to their history of

growth in separate strands than to any meaningful difference between them.

32. Consider, for example, the warrantless search incidental to arrest. What is the justification for the intrusion this power authorizes? To simply answer "the arrest itself" is to beg the question; why should an officer arresting an individual be allowed to search him and seize items from his possession? The case-law gives a number of different answers: the fruits of the offender's crime may be in his pockets, there may be other evidence of the offence concealed on his person, or he may be carrying a weapon which could injure his captors and aid his escape.[27] The interests inherent in these answers — denying the fruits of crime to the offender, obtaining evidence to prove the offence, protecting the police and other members of society — are indeed inherent in warrant provisions as well: sections 443 and 101 of the *Criminal Code* and the relevant sections of the *Narcotic Control Act* and the *Food and Drugs Act*.

33. This is not to say that the fact of arrest is irrelevant to the question of whether or not a search is justified. Indeed, this paper adopts the position that the protective rationale for search is stronger when arrest has occurred than when it has not.[28] However, what is critical here is that while the items sought may be identical in an arrest situation and a search of premises, the search in the former case may be performed without warrant, while the latter search may not. Why? The answer lies in the circumstances under which the search is conducted. In performing a search incidental to arrest, a peace officer is presented with a situation of heightened urgency. For example, to delay searching an arrested person for a stolen watch until a warrant is obtained increases the possibility that he will get rid of the item, whereas the delay in obtaining a warrant to search a home for the same item does not entail the same degree of danger.

34. The discussion of the interests that justify intrusive searches and seizures is thus separate from that of the circumstances which determine the procedure that ought to be employed to authorize them. And of the two issues, it is justification that is logically prior. There is no point in deciding how to authorize an intrusion until and unless the intrusion is deemed to be worthy of authorization. This order of priority has been recognized in the codifications proposed by both the Australian Law Reform Commission[29] and the American Law Institute.[30] In each case, the model code begins by establishing objects of search and seizure (*viz.* objects in which the State has a sufficient interest to justify the intrusions consequent upon an exercise of these powers). Then, the

model legislation goes on to set out the procedures under which these objects may be obtained. This order of priority will be followed in this Working Paper.

B. The Warrant as General Requirement

35. This paper has already acknowledged the characterization of the warrant as a judicial, particular mode of authorization.[31] These features respectively purport to ensure that no intrusion occurs until the existence of a justification for it has been objectively determined, and that the scope of the intrusion requested and permitted is clear to applicant, adjudicator, executor, and any individual affected by the exercise of the power. These safeguards are rooted in the common law's perception that the intrusions which may flow from the authority to search and seize are serious ones, and therefore ought to be carefully controlled. Although empirical evidence points to certain shortcomings in the control over police discretion exerted by warrant procedures, it also shows that warranted searches remain relatively constrained compared to warrantless ones. In addition to the control factors introduced before the intrusion takes place, the warrant procedure with its reliance on documentary authority possesses certain advantages in terms of review.

36. If it is accepted that respect for individual rights is still a critical social value, then it follows that the control the warrant purports to exemplify ought to be generalized as much as possible. The preference for controlled intrusions over discretionary ones was indeed central to the acceptance of search powers in the first place; Hale could only validate the power conferred by the warrant by incorporating into this mode of authorization the features which would ensure that the power was not improperly exercised.[32]

37. Although times have changed considerably since Hale's day, the argument for carefully controlled searches is still vital; if it is clearly unrealistic to advocate a hard and fast prohibition against intrusions without warrant, the preference in favour of warrants remains. This preference has been explicitly articulated in American jurisprudence[33] and is arguably implicit in the Canadian cases, such as *Pacific Press*, which have adopted strongly protective positions.[34] In the task of developing rules, this preference argues for the streamlining of procedures to make the warrant a more efficient, accessible and therefore utilized mode of authorization. As a matter

of basic principle, it argues that the warrant is always *an* appropriate device for authorizing a search and seizure. In other words, there should not be any instance in which, the justification for intrusion being present, the authorization for intrusion cannot be received through a warrant. The question of whether or not another alternative ought to be made available to a prospective searcher resolves itself into a discussion of whether or not circumstances of particular situations render compulsory resort to warrant procedures impracticable or unnecessary. The comprehensive discussion of these circumstances is reserved for Chapter Six of this paper.

38. It may be argued that statutory preference for a warrant is somewhat misleading and misconceived in that modern practice makes warrantless intrusions the rule rather than the exception. An argument to this effect has been made with particular reference to arrest.[35] On the other hand, the frequent use of the warrant in searches of premises is proof that even under the highly disorganized state of the present law, a warrant requirement is not ignored in practice. Conceding that circumstances often prompt and indeed justify an officer's decision to proceed without the warrant does not mean that there is no point to viewing the power to so proceed as an exception to a general requirement. The generality of the requirement is not a matter of factual likelihood, but rather one of preference, in principle; this principle merely requires that before a warrantless intrusion can be permitted in a particular case, it must be established that resort to the warrant is inappropriate.

CHAPTER FIVE

Justifications for Intrusion

I. Criminal Law Enforcement

39. Criminal law mirrors, or should mirror, a society's perception of its fundamental values. Violations of the prohibitions protecting these interests may lead to serious infringements upon an individual's liberty and privacy. These infringements appear most stark in the context of sentencing the offender following an adjudication of his guilt. However, the primary issue in the discussion of police powers is that of the justification for intrusion prior to an adjudication of guilt. The thesis adopted in this paper is that these justifications are rooted in the need to effectively respond to and prosecute the commission of a criminal offence.

40. The enforcement of criminal law has not always been so elevated among interests. Although the apprehension of felons was one of Hale's articulated aims in his promulgation of search warrants,[36] the only items that could be seized under their authority were the stolen goods themselves. Indeed, for centuries, a necessary basis of the seizure of goods was the belief that their possessor was not entitled to them. This extended not merely to stolen goods but also to contraband, and even, according to the opinions of some commentators, to the instruments of crime, to which primitive notions of fault, justifying confiscation, appear to have been attached.[37]

41. That the State need no longer assert a superior property claim in order to justify seizure is a product both of the decline of property from its sanctified plateau, and the rise of criminal law

enforcement as a dominant social concern. The great landmark in this latter development[38] was the institution of the police force in the nineteenth century; soon afterwards, the case-law began to recognize criminal law enforcement as a strong interest, which could justify seizures in its own right. An accused's proprietary rights in items of evidentiary value, for example, became subordinated to the State's need to preserve proof of guilt for trial. This expansion of the basis for seizure, however, carefully respected certain limitations. These limitations, which have remained in place up to the present day, reside in the "responsive" nature of the criminal justice system.

A. The Sequence of Crime and Response

42. It seems trite to observe that the accusation and prosecution of a criminal offence, around which our system of criminal procedure is built, are responsive measures. The prosecution pursues the charge, and the charge itself responds to the initiation of the offence it comprehends. But the fact that our criminal law enforcement system is founded on this sequence of crime and response to crime is itself noteworthy. A responsive, accusatorial system is by no means the only obvious structure according to which a State can enforce its laws; indeed, England itself experienced its share of inquisitorial bodies, such as the Star Chamber and the High Commission. That the accusatorial system has prevailed is attributable in large part to the recognition of a concept that has achieved an elevated status over the years: the rule of law.

43. The first principle of the rule of law was formulated by Dicey as follows:

> [N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[39]

Followed literally, this principle might be interpreted so as to preclude pre-trial intrusions upon "body or goods", such as seizure and arrest. However, in a later passage Dicey quite clearly countenanced the existence of pre-trial powers so long as they were not exercised "in any manner that does not admit of legal justification".[40]

44. Although the wide application of the rule of law to such concerns as the powers of administrative agencies is perhaps problematic in this day and age, the specific thrust of this first principle is cogent and sound. Dicey took his inspiration, not only from British history, but from a reading of European politics that led him to conclude that "wherever there is discretion, there is room for arbitrariness".[41] Accordingly, the "legal justification" for intrusion had to be clearly defined in terms of individual conduct. It might be said that Dicey recognized that an individual should not be vulnerable to state intrusion because of the kind of person he is, but rather only because of the kind of act he may have committed.[42]

45. Dicey himself declared that the protection of liberties was afforded by a tradition of judicial decisions rather than by a set of rules in constitutional documents.[43] Today, however, his principles are to some extent enshrined in the *Canadian Charter of Rights and Freedoms*: equality before the law, the protection against arbitrary detention, the right to a fair trial and, most importantly for our purposes, the security against unreasonable search and seizure.[44] More significantly, perhaps, they have served as assumptions upon which much intrusive legislation has been based. But while these expressions of the rule of law confirm its continued vitality at a general level, they leave open many critical issues as to its application in the day-to-day reality of criminal law enforcement. In particular, it is worth enquiring how the restraining principles mesh with the mandate of the modern police force.

B. The Modern Police Force and Crime Prevention

46. It is fair to say that much of the impetus for the creation of the modern police organization sprang from the need for systematic crime prevention. The 1829 general instructions to the newly formed London force read in part:

> It should be understood, at the outset, that the principal object to be attained is "the prevention of crime". To this great end every effort of the Police is to be directed. The security of person and property, and all the other objects of a Police Establishment, will thus be better effected, than by the detection and punishment of the offender after he has succeeded in committing the crime....[45]

By and large, however, this preventive strategy was expressed in non-intrusive exercises, such as patrols, rather than in intrusive ones.

Even the most vehement of the crime prevention theorists of the eighteenth and nineteenth centuries in England drew the line at actually intruding upon individual rights before an offence had been committed. Bentham, for example, the great exponent of "prophylactic" measures, recognized this limitation quite expressly: the task of the police, he stated, should be "to intervene as soon as an offence may announce itself in various manners".[46]

47. The years since the introduction of the police force have seen discussions of new and efficient techniques of law enforcement. Yet the principle that the police ought not to intrude upon individual rights until an offence has been initiated has not been seriously challenged. Is this principle still a valid one? The argument against it may be put in straightforward terms: prevention is better than cure.[47] By acting in advance of the commission of the offence, this argument runs, the police ultimately benefit everyone concerned. The public is spared the cost consequent upon the violation, the criminal justice system is relieved of the burden of a prospective prosecution, and the individual himself suffers a relatively minor infringement compared to the detention, trial and sentence which would potentially await him if the crime were actually perpetrated.

48. The problem with this argument is that it seriously compromises individual security. It is possible to couch preventive powers in terms of reasonable beliefs or suspicions, but once these beliefs or suspicions cease to be attached to clearly defined and perceived conduct, their "reasonableness" ceases to provide meaningful protection. Personality becomes a factor in susceptibility to intrusion. The problem has an acute contemporary dimension; insofar as "proactive" strategies involve the police in performing intrusions based on perceptions of a person's criminal propensities rather than the belief that he has committed a particular crime, they create the kinds of dangers that Dicey feared.[48] That such intrusions have been carried out under the surface of a system that ostensibly applies the rule of law has enabled policy-makers to avoid facing a critical question: Is the prevention of crime an objective of sufficient importance to justify derogating from traditionally expressed limitations upon criminal law enforcement?

49. Ultimately the answer to this question reflects the values of the decision-makers. In our Report, *Our Criminal Law*, we recognized limitations upon sentencing techniques:

> Above all, our society has too much respect for freedom and humanity to countenance measures stern enough to make deterrence really

> bite.... In short, the very nature of our society prevents our criminal law from fully organizing the future.[49]

The same values insist upon limitations at the earlier stages of criminal law enforcement. That the prevention of crime is an important social goal is undeniable; its pursuit through both traditional methods such as patrol, and relatively modern ones such as public education and participation programmes, is to be encouraged. But out of an overriding respect for individual rights, the general rule must be that intrusions upon these rights can only be justified following the initiation of an offence.

50. This does not mean that an intrusion cannot have a preventive aspect to it; indeed, one of the basic reasons for infringements upon the interests of an individual who has committed an offence is to safeguard the public against its repetition. This is perhaps most evident in the *Criminal Code* provisions dealing with arrest, detention and bail;[50] the need to "prevent the continuation or repetition of the offence or the commission of another offence" must be considered by the arresting officer, the officer in charge, and the judicial official presiding at the show-cause hearing. The legitimacy of this factor, which has also been relevant to search incidental to arrest, is accepted in this Working Paper. So long as the intrusion is performed after the initiation of a relevant crime, it is not objectionable merely by virtue of its preventive effect.

C. Search and Seizure as Responsive Powers

51. Though our system of criminal procedure may be built around the accusation and prosecution of a criminal offence, the relationship between powers of search and seizure and these procedural touchstones is a qualified one. In practice, searches both with and without warrant are often carried out without any charges being laid as a result.[51] Conversely, many investigations and prosecutions are conducted without resort to any power of search and seizure.[52] Although associations between search and prosecution continue to exist in law, they are more flexible than those that characterized early search and seizure powers which were specifically focused upon suspects or apprehended criminals. This focus may have remained relatively constant in the laws governing warrantless searches of persons; if such searches are now statutorily authorized in cases other than arrest, they are still associated with

items, such as weapons or drugs, possession of which by the individual affected is likely to comprise an offence. In the case of search with warrant, however, the focus has changed substantially.

52. It used to be that the prerequisite to the performance of a search with warrant was not merely the initiation of an offence, but a distinct charge or accusation. Hale's warrant, for example, was issued in response to a complaint against the individual in possession of the stolen goods; when executed, it authorized an arrest as well as a search.[53] This requirement has long since been abandoned, however. In *Re Liberal Party of Québec and Mierzwinski*, Barrette-Joncas J. concluded,

> [t]he case authority recognizes that the name of an accused or of an eventual accused is not necessary to obtain a search warrant.[54]

Indeed, as we confirmed in our warrant survey, a substantial number of warrants are executed against parties whom the police do not even suspect to be implicated in the offence; 20% of the warrants examined by the judicial panel we assembled fell within this category.[55]

53. It is quite proper for the police to decide to conduct the search first, then lay any charge disclosed by the investigation. This sequence is a sensible one, both because the laying of a charge is ultimately a more lasting infringement upon the individual, and because of the increased likelihood of the destruction of evidence after the charge has been laid. Moreover, in the case of search without warrant, any factor of urgency that made the obtaining of a warrant impracticable would similarly militate against the prior laying of a charge. It remains critical, however, to ensure that search and seizure powers are exercised only in situations in which the interests of criminal law enforcement are sufficiently served to justify the intrusion at stake. These interests may be identified by looking to the purpose of search and seizure: to obtain things, funds or information. The question thus becomes: What categories of things, funds or information should the police be empowered to search for and seize in response to the initiation or commission of a criminal offence?

54. Posing the question in this manner involves assumptions that depart from the traditional legal approach somewhat. First, it assumes that obtaining pre-existing information from the persons, places or vehicles to be searched is as valid a form of the exercise as actually taking *things*. Yet the traditional approach, as embodied in the *Bell Telephone* case,[56] has been to restrict search, at least with warrant, to the physical taking of things to be used as evidence. Similarly, insofar as we contemplate the acquisition of control over

funds in intangible form, we also expand beyond restrictive interpretations of present law. Before proceeding to define the classifications of objects that should be seizable under crime-related procedures, therefore, it is useful to clarify the inclusion of information and funds within the ambit of these procedures.

D. Things, Funds and Information

RECOMMENDATION

1. To accord with modern techniques of acquiring and storing things and information, it should be specified that powers of seizure may authorize:

(a) taking photographs of a thing which is an "object of seizure";

(b) obtaining records which are "objects of seizure", regardless of the physical form or characteristics of the storage of the records; and

(c) acquiring control over funds which are "objects of seizure" in financial accounts.

(1) *Things and Information*

55. The first search warrants were for concrete things: stolen goods or instruments of crime, over which the State or the applicant for the warrant could assert a superior property interest to that of the possessor. The effect of the seizure was to hold the item until it was either confiscated or restored. Yet if the evidentiary nature of the item seized was not explicitly recognized in the early legislation, this does not mean that the item was unavailable to the trier of fact; indeed the trier of fact for charges of possession of stolen goods was likely to be the same magistrate to whom the goods were presented following the seizure.[57]

56. Indeed, the evidentiary purpose of items seized began to creep into legislation in cases of felonies, specifically coinage offences, which the justice or magistrate could not himself try; it then became his reduced function to secure the items for their use at a future trial.[58] Once this new purpose became explicit, it became apparent that the goods were not simply being seized for restoration or confiscation; rather, they were being used also for the information

they afforded to the trier of fact. And as modern police began to take over investigative duties, the recognition began to emerge that the recipients of the information disclosed by the items were not simply the eventual triers of fact, but also the police themselves. The current law clearly sanctions the use of seized items for police investigation; in the *PSI Mind Development Institute* case, the warrant was described as one of the "procedures and aids lawfully available" to the police "to conduct their own investigations".[59]

57. The use of a search power to provide information to the police was manifest quite early in the case of the warrantless search incidental to arrest. In *Dillon* v. *O'Brien*, the preservation of the material evidence of guilt was recognized as a justification for detention of an arrested person's possessions.[60] Yet, in a sense, the search of the person incidental to arrest had long since implicitly recognized another sort of informational interest: the ascertainment of whether or not the person was concealing a weapon that could endanger his captor;[61] in other words, it was the information as to the presence of the thing, not the thing itself, that was primarily important.

58. Once the informational aspect of things or the presence of things is regarded as a separate and sufficient basis for intrusion, it is illogical to exclude forms of obtaining information that do not constitute the physical taking of items from the definition of seizure. In fact, the acquisition of information in secondary, recorded form is likely to cause a good deal less inconvenience to the affected individual than the physical taking of things revealing that information. Consider, for example, the following situation. A murder is committed on *X*'s premises, without any involvement by *X*. Bullet holes are found in a number of pieces of furniture. It is clear that under paragraph 443(1)(*b*) of the *Criminal Code*, the police could obtain a warrant to seize the furniture; on the other hand, there is no clear authority which would allow them to enter *X*'s premises without *X*'s consent, and merely photograph and measure the bullet holes. Yet the intrusiveness of the exercise is far greater in the former case.

59. The alternative of recording information rather than removing items from premises is explicitly recognized in subsection 29(7) of the *Canada Evidence Act*, which covers searches for documents in financial institutions, and provides in part:

> [U]nless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything therein shall, as regards

the books or records of such institution, be construed as limited to the searching of such premises for the purpose of inspecting and taking copies of entries in such books or records.[62]

While it may be that financial institutions have a particularly acute interest in keeping their records on their own premises, the principle in favour of minimal disruption of an individual's interests is a general one. Where the photographing of information, rather than the taking of things, is sufficient to serve the interests of law enforcement, it should be not only authorized but encouraged. This encouragement entails some modification to evidentiary rules as well as laws of search and seizure; as such, the subject is beyond the scope of this Working Paper. What can be done here is to recommend that the definition of seizure encompass making copies or taking photographs. To ensure that search and seizure powers are not used as a pretext for surveillance of premises, it should be made clear that the definition does not include recording any events occurring subsequent to the commencement of the intrusion.[63]

60. The definition of seizure also should include the collection of data from computers. There is, in principle, no reason why information that would be seizable if contained in a document should be immune from seizure because it is stored in a computer record. Equal treatment of documents and computer records appears, for example, in the proposed federal freedom of information legislation, under which access is granted to government records:

> "record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.[64]

We accept that a similar breadth of definition is appropriate to search and seizure laws.

61. Permitting police officers to photograph objects or obtain information from computers creates certain dangers of invasion of privacy. Because these activities are less physical or visible than the removal of objects, apprehensions may be raised of systematic monitoring of individuals without their knowledge. While appreciating such concerns, we do not accept that they dictate that search and seizure laws be confined to primitive technological methods. Such a result would discriminate in favour of the technologically sophisticated criminal. Rather, in expanding search and seizure law, we seek to make the acquisition of information subject to the same

principles and protections as the acquisition of things. In part this entails certain procedural decisions, which will be discussed in later Chapters. Primarily, it requires that the same categories which limit things subject to seizure also cover information recorded or stored in other ways.

(2) *Funds*

62. The final component of our recommendation is directed towards clarifying the situation with respect to financial accounts. We begin with the observation that illegally obtained money in tangible form has long been seizable. For example, the 1836 English case of *Burgiss* held that coins found in possession of a prisoner charged with forgery could be retained on the basis that there was reasonable ground to suppose that the coins were proceeds of the crime.[65] Proceeds, of course, may be converted into different forms of property, and Anglo-Canadian courts have recognized the legitimacy of following the money for purposes of restitution insofar as it can be traced through these conversions. Specifically, it has been noted that the mere fact that money has passed through a bank account does not impede the common law right to trace.[66] Moreover, by virtue of the extended definition of "property" in section 2 of the *Criminal Code* so as to include "a right to recover or receive any money or goods", it has been suggested that offences concerning property may cover the possession of funds in accounts.[67] We firmly agree with these positions.

63. The problem with respect to seizing the money in the account under present crime-related law is that subsection 443(1) of the *Criminal Code* refers to seizure of "anything" fitting within the designated classifications, an expression that may not cover intangible forms of obligation represented by a debt or loan.[68] In the recent House of Lords decision in *Cuthbertson*, for example, it was found that a forfeiture provision covering "anything" related to drug offences did not apply to profits of drug trafficking held in bank accounts since these were not "tangible things".[69] While the merits of this decision might be debated and perhaps ultimately resisted by Canadian authority, it would seem prudent to explicitly cover funds in financial accounts in search and seizure provisions intended to apply to them.

II. Objects of Seizure

RECOMMENDATION

2. "Objects of Seizure" means things, funds and information which are:

(a) takings of an offence;

(b) evidence of an offence; or

(c) possessed in circumstances constituting an offence.

"Takings of an offence" means stolen property or other property taken illegally from the victim of an offence. It includes property into, or for which, takings of an offence originally in the possession of an individual have been converted or exchanged.

64. In this subchapter, we develop a definition of "objects of seizure", *viz.* those objects that will always justify a search or seizure, whether with a warrant or, if an exception to the warrant requirement obtains, without one. An examination of the statutes and jurisprudence discloses that there are five classifications of things, funds or information in which the criminal law enforcement system traditionally has asserted an interest. These are things, funds or information:

(a) necessary for the physical protection of peace officers and other individuals;

(b) which represent the "fruits of crime", an expression comprehending both the "takings" and "profits" received in connection with an offence;

(c) which are possessed in circumstances constituting an offence;

(d) which provide evidence of the commission of an offence; and

(e) which are the instruments or means by which an offence has been or may be committed.

Our recommendation, which is set out following paragraph 100, condenses and rationalizes these classifications. To explain our position, however, it is useful to analyse them in turn. In addition, it is relevant to consider the use of search powers to rescue persons detained illegally.

A. Protection

65. Traditionally, this justification for intrusion has been associated with common law searches incidental to arrest. However, it also finds expression today in section 101 of the *Criminal Code*, which allows searches for, and seizures of, various weapons on the basis of a belief that "it is not desirable in the interests of the safety" of the individual searched, or of any other person, that the individual have a weapon in his possession, custody or control. In practice, as might be expected, protective searches are most frequently conducted upon the person of the individual and are usually performed without a warrant.

66. What is immediately remarkable about protection as a justification is that it looks not to the past, nor even to the present, so much as to the future. In other words, at first glance it seems to reverse the sequence of crime and response to crime which is integral to intrusive practices under our law enforcement system. When put in the context of an arrest, however, the sequence is restored; the arrest is itself a response to the commission of an offence, and the search, insofar as it is protective, basically serves to effectuate the arrest by preventing escape, and ensuring the safety of the police and the public. As was recognized in *Leigh* v. *Cole*, "the police ought to be fully protected in the discharge of an onerous, arduous and difficult duty — a duty necessary for the comfort and security of the community".[70] We develop proposed rules regarding protective search and seizure incidental to arrest later in this paper.[71]

67. It might be argued that "the interests of safety" test in section 101 is simply an extension of the rationale underlying the protective search incidental to arrest. The significance of the extension cannot be overemphasized, however. By failing to conform to a sequence of crime and response to crime, the provision opens the door to the dangers of focus on criminal propensity rather than conduct, the projection of uncertainty into the criminal law, and the fostering of opportunities for arbitrary intervention. The legitimacy of the provision as a necessary measure to deal with the use of firearms basically involves an argument for an exception to a general rule, and the topic will be discussed accordingly later in this paper.[72]

68. The seizure of weapons for protective purposes essentially subordinates the individual's possession of the weapon (if it is indeed his own) to the interests of safety of the peace officer and/or of other individuals. The State asserts no superior property interest in the

weapon; in fact, the legislation has recognized, to some extent, the propriety of compensating an individual for the loss of his weapon under such circumstances in which no offence has been committed. Such, at least, was the finding in the *Thomson* case, a decision of the Ontario Provincial Court interpreting section 101, in which an individual was entitled to the proceeds from a judicially sanctioned sale of certain weapons taken from her possession.[73] The legal situation in case of a purely protective seizure is to be contrasted with that obtaining in the case of seizures of weapons illegally possessed or used in the commission of a crime; by virtue of sections 100(3) and 446, such weapons are forfeited.

69. The protective rationale for search and seizure may overlap with other justifications. There are many sections of the *Criminal Code* prohibiting or regulating the use and possession of weapons.[74] Accordingly, a weapon often may be reasonably believed to have been possessed in circumstances constituting an offence or it may serve as evidence in a prosecution for a violent crime. When neither of these circumstances obtains, however, we conclude that as a general rule the protective rationale is not a sufficient justification for an intrusive search or seizure outside the context of arrest. Thus, we do not include a separate classification concerning protection in our basic definition of "objects of seizure".

B. Fruits of Crime

70. The term "fruits of crime", which appears in both the *ALI Code*[75] and the American Federal Rules,[76] actually embraces two distinct classifications of items. First, there are those things or funds that either correspond to or represent the proceeds of transactions traceable to property wrongfully taken from a victim who is its rightful possessor. Examples of this classification under present law would include stolen property,[77] property received from fraud, forgery, extortion or the sale of stolen property,[78] and a motor vehicle taken without the consent of the owner.[79] For the sake of precision, this classification will be called "takings". Second, there is property that represents income from the commission of an illegal act, such as the sale of prohibited narcotics,[80] restricted or controlled drugs,[81] or obscene publications.[82] Unlike takings, this income does not rightfully belong to anyone other than the individual searched; however, the State has often asserted that it is entitled to confiscate

it, since the individual would not have received it had he remained obedient to the law. This classification will be referred to as "profits".

71. A number of procedural and technical problems arise with respect to both of these classifications — problems pertaining, for example, to the depositing and mixing of funds in bank accounts. These problems will be discussed later in this paper.[83] Our immediate concern is with the justifications for seizing these classifications of things under crime-related search and seizure powers.

(1) *Takings of Crime*

72. The recovery of takings is the oldest justification for search with warrant, dating back to the time of Hale. In practice, takings are frequently identifiable as the objects of such searches, even though the warrant itself is likely to specify that the property is sought as "evidence of an offence".[84] The same objective has also appeared in the context of search incidental to arrest. In the *Percival and McDougall* case, for example, an application for return of money used as exhibits at trial was refused, partly on the basis that the money, taken from the accused upon their arrest, was stolen.[85]

73. A purpose of the State's acquisition of control over takings is their return to the victim of the offence. Indeed the law has long recognized that the victim himself has certain remedial powers to recapture chattels wrongfully possessed by another.[86] The involvement of the State introduces a new element into the situation; the State, in effect, acts as intermediary in a restitutionary transaction. The final step in the process may be made by means of an order at the end of trial, under section 655 of the *Criminal Code*, which provides for the restoration of "property obtained by the commission of the offence". This is not, of course, the only restitutionary provision available; in the *Criminal Code* one also finds section 653 (which allows a court to make an order of compensation for loss of property), section 654 (which provides for compensation to *bona fide* purchasers), and paragraph 663(2)(*e*) (which makes restitution a possible condition of a probation order). We do not accept, however, that search and seizure provisions should anticipate restitution in this wide sense. Rather, we take the view that objects seized must be traceable to objects wrongfully taken.

74. The reason for our position derives from Dicey's principle prohibiting punishment before conviction. The seizure of takings and their return to their rightful possessor, while undoubtedly

inconvenient to the party searched, is primarily redistributive rather than punitive; it re-establishes the pattern of holdings that existed before the offence was committed. Indeed, the power under section 655 to make a final distribution of property is not dependent upon a conviction; rather it springs from the State's interest in ensuring that at the end of the trial process, everyone involved has what belongs to him. To deprive the accused of such property is not punishment in a true sense; he is not denied anything the State recognizes as a rightful possession.

75. On the other hand, the seizure of objects not traceable to the offence itself is essentially punitive. Not only does it anticipate the conviction of the accused and the making of a restitution order as an incident of sentencing, it also effectively punishes him before trial, by denying him items that are indisputably his own. Unless the State has a distinct justification for the control of these things, such as their use as evidence, we propose that their seizure and detention before trial be unacceptable.

76. On the other hand, we accept the legitimacy of seizure of items traceable to the original takings. In adopting this position, we refer to the extended definition of "property" found in section 2 of the *Criminal Code*, which includes property into, or for which, other property has been converted or exchanged. As well as applying to restitution proceedings under section 655, this definition could be used at present in conjunction with section 312 of the *Criminal Code* to obtain a section 443 search warrant for objects traceable to the crime at issue; where an information alleged commission of possession of "property obtained by crime", a justice could issue a warrant to seize the items on the basis that they comprised "anything ... in respect of which an offence" had been committed. While agreeing with the principle served by such construction, we find it unnecessarily complex. Accordingly, we recommend that a classification of takings be included in the definition of "objects of seizure" and that this classification itself incorporate by reference the relevant part of the definition of property.

(2) *Profits of Crime*

77. The common law has also asserted a strong interest in denying an individual any profits from a crime he has committed. Where these profits are not traceable to a victim of the offence, the courts have asserted their susceptibility to forfeiture to the Crown.

This policy has been evident in recent sentencing decisions concerning drug trafficking. In the *Kotrbaty* case, for example, Berger J. imposed a fine that deprived the accused of profits made from the sale of heroin.[87] Should this policy be recognized at the search and seizure stage, as well as in the context of sentencing?

78. Profits of an offence, as such, would appear to be seized relatively infrequently. This may be attributed to a number of factors. Unlike stolen property, profits almost always first come into the offender's possession in the form of money, which is difficult to follow. So too, since the payer of the money is likely to be implicated in the offence, he is less likely to be co-operative with the police than a victim of a theft or fraud; accordingly, the difficulties of following and segregating funds are compounded. Indeed, the most likely opportunities for seizing profits would appear to be either situations in which undercover police are parties to the exchange of funds, such as drug purchases, or situations in which the offence itself, gaming or betting for example, involves the use of money.

79. In fact, no crime-related search and seizure law mentions the possibility of seizing or detaining profits as such. In the case of section 181 of the *Criminal Code*, money may only be seized and detained if it is "evidence" of a gaming offence. While money is often seized in narcotics and drugs searches as either evidence or "any other thing ... in respect of which" an offence has been committed, the evidentiary potential of the money must be established if a restoration application is made by its lawful possessor.[88] Recently, some police and prosecutors have taken the view that warrants under subsection 443(1) of the *Criminal Code* may be used to seize profits by alleging that such profits constitute property possessed contrary to section 312.

80. The issue of the seizure of profits deserves clarification. We take the view that only when and if profits of crime are either illegal to possess or declared forfeit should the State have the power to seize them. In strict terms of ownership, profits, unlike takings, belong to the searched individual; indeed, in the *Smith* case, Addy J. went so far as to assert that "an absolute right of property" was at stake in restoration proceedings regarding moneys seized in a drug investigation.[89] And unlike the case of takings, no other individual stands to suffer if profits are dispersed by their possessor before his conviction; if the State cannot exact its penalty upon the money of the accused, there are other variables of sentencing that may be adjusted accordingly.[90] It may be argued that the deprivation of profits ought not to be just one in a number of sentencing options, and

that an individual ought to be denied such ill-gotten gains. Steps to implement such a policy, in the form of *in rem* divestiture procedures, have been introduced into American organized crime statutes[91] and discussed here in Canada.[92] For reasons that will be elaborated later, however, we believe that *in rem* procedures ought not to exist in a *Criminal Code*.[93] As to whether or not possession of profits of an offence is at present or should be a crime in itself, we take no position in the present paper. Absent such a crime, we adhere to the position that steps to acquire profits must await sentencing.

81. Given the position outlined above, we find it unnecessary to specify a separate classification for "profits of an offence". If possession of such profits is itself a crime, their seizure will be clearly mandated under the classification, which we are about to develop, of "objects possessed in circumstances constituting an offence".

C. Objects Possessed in Circumstances Constituting an Offence

82. There is a direct connection between offences that deprive individuals of the right to possess certain items, and search and seizure powers; the latter enforce the prohibitions that the former define. The prohibition on individual possession may still, as in the case of counterfeiting provisions, be linked to an assertion of ownership by the State;[94] more often, it simply reflects a perception of dangers that attend possession. The paramount examples of such a perception are those inherent in narcotics and drugs legislation, and in the weapons provisions in the *Criminal Code*.[95] Searches for, and seizure of, narcotics are quite frequent in practice under all modes of authorization, including the writ of assistance. As indicated earlier, weapons searches are also quite frequent and occur predominantly without warrant.[96] Although a moratorium on writ applications has been imposed, the Commission survey of writ usage indicated that, particularly in Edmonton and Vancouver, the existing writs were commonly employed in *Narcotic Control Act* and *Food and Drugs Act* searches.[97]

83. Although some of the items seized may be used for evidentiary purposes, the scope of the seizure we envisage is not restricted to what is required for these purposes. It is difficult to argue that the police, finding a large shipment of counterfeit money,

for example, should seize only that portion of it that would enable them to prove the offence. Since the person cannot lawfully possess any of the money, it follows that he should be deprived of all of it. The matter is not so simple, however, where the item is illegal to possess only for a particular purpose. This category of item includes controlled drugs,[98] burglary tools,[99] obscene publications and crime comics.[100]

84. First, since mere possession of the items is not an offence, it follows that there is no justification for seizing them, unless grounds exist for believing that the possessor has the requisite illegal purpose in mind. This qualification would appear to be recognized in existing legislation. Subsection 37(2) of the *Food and Drugs Act*, for example, makes it clear that the drug must be one "by means of or in respect of which an offence ... has been committed"; an offence would not be committed by a possessor of amphetamines, for example, unless and until the "purpose of trafficking" attended the possession.

85. Second, the scope of intrusion justified as a response to such an offence is called into question. Plainly, it would be legitimate to seize those items or that quantity of substance which serve an evidentiary purpose. But what about the rest? It might be argued that since it is not *per se* illegal for these items to be possessed privately, the State has no basis for acquiring control over them. In the *Nimbus News* case, for example, it was observed that conviction of an offence of possession of obscene matter for the purpose of distribution would not in itself make continued possession of the magazines unlawful.[101] The logic of this position would dictate that items such as obscene publications or controlled drugs be left with their possessor unless required at trial. Yet the shortcoming of such a conclusion is obvious: it countenances the possibility that the unseized items will be distributed or used in precisely the illegal manner apprehended when the search was authorized.

86. To address this possibility we recommend expanding the scope of seizure to include all the relevant items. In a sense this is a preventive measure; indeed, it is the capacity to seize all offensive publications that has been said to distinguish the preventive power of search under *in rem* proceeding provisions from the conventional section 443 power.[102] However, the rationale for comprehensive seizure of, say, illegally possessed amphetamines, is not entirely preventive; rather, the seizure aims to stop the continuation or repetition of an offence — the further pursuit of the purpose of trafficking. Since the illegal possession precedes the intrusion, it is

plain that the seizure falls within the sequence of crime and response to crime which is fundamental to criminal procedure. It is also relevant to note that, at least in the case of controlled drugs and offensive publications, the absence of an offence covering simple possession does not necessarily represent any perception that possession in itself is harmless to society. Rather, it may reflect a decision to focus the attention of criminal law enforcement institutions upon the distributor rather than the possessor.[103] Insofar as this is true, it seems somewhat self-defeating to permit the police to search and charge an individual believed to be a distributor, yet to withhold from them the power to seize from him the very items the criminal prohibition was designed to suppress.

87. This does not imply that the *in rem* procedures presently set out in the *Criminal Code* are adequate; problems with these procedures will be discussed later in this paper.[104] Rather, it calls for the recognition in a set of general rules of the legitimacy of seizing all items, or the whole of a substance possessed for an unlawful purpose. This position concedes the possibility of a subsequent finding being made at trial that the items or substance seized were not so possessed, a possibility that may connote a substantial and mistaken deprivation to the individual concerned in the interim. However, this possibility applies to all categories of objects: money seized as the takings of an offence, for instance, may turn out to be acquired lawfully. The concern about mistaken intrusions and deprivations must be general, expressed in standards of proof and provisions for disposition of things seized. It should not preclude the seizure of items which, in certain correctly-identified circumstances, should not be allowed to remain with their possessor.

D. Evidence of Crime

88. Particularly in connection with warrants, the evidentiary justification for search and seizure has been emphasized both by the courts and in practice. It has been estimated that over 80% of the Canadian case-law on section 443 warrants deals with informations in which exclusive reliance was placed upon paragraph (1)(*b*), which authorizes search for evidence of an offence.[105] The results of the Commission's warrant survey are even more lopsided; 134 out of 136 section 443 warrants examined by the judicial panel we assembled were issued on the basis of paragraph (1)(*b*).[106] The evidentiary

justification, of course, has long been recognized in the context of warrantless searches incidental to arrest. While Canada historically may have taken a rather brash step in allowing purely evidentiary seizures under warrant outside of arrest, accepting without apparent difficulty a rationale for intrusion questioned in other jurisdictions, this ground for search is too strongly entrenched to question seriously now.

89. To some extent, the evidentiary justification overlaps with others. Both takings of an offence and contraband may serve evidentiary purposes; a narcotic, for example, is seized not only because its possession is prohibited, but also because a conviction under narcotics legislation requires proof that the substance seized was indeed a narcotic. However, the seizure of items of exclusively evidentiary value (particularly documents) is still the predominant practice of peace officers acting under warrant. In affirming this ground for seizure, we recognize that even when lawfully possessed, the value of evidence to our criminal law enforcement system outweighs the inconvenience seizure may cause to its possessor.

90. The courts have been generally lenient in their interpretation of what constitutes "evidence" of an offence. In the *Worrall* case, Porter C.J.O. elaborated upon the meaning of the test:

> It means, I think, that the Justice must consider whether the production of the articles ill afford evidence which would be relevant to the issue, and would be properly tendered as evidence in a prosecution in which the alleged fraud is in issue.[107]

In focusing upon potential relevance, the courts have, in effect, given the Crown considerable discretion; they have balked, at least at the issuance stage, at considering the *necessity* of actually taking the items away from their possessor. Necessity, rather, has only arisen in cases such as *Nimbus News*[108] and *Pink Triangle Press*[109] which have involved applications for return of items seized. This state of affairs represents a compromise of sorts. To tolerate the seizure of items that the State may not actually need for its law enforcement purpose is to concede a degree of inefficiency in the exercise of police powers. On the other hand, particularly in instances in which evidence may be buried somewhere amidst a large volume of documents, it is unrealistic to demand that the police make a binding selection of the items they intend to use before making a seizure. Accepting the validity of the compromise, however, does not mean accepting the present provisions which purportedly effect it. This is primarily a

problem of post-search procedures, and accordingly will be reserved for the Working Paper dealing with this particular subject.

E. Instruments of Crime

91. The search for instruments or means of an offence is not given precise statutory authorization in Canada, but strands of recognition do exist. Both *Narcotic Control Act* and *Food and Drugs Act* provisions and section 99 of the *Criminal Code* allow the seizure of things "by means of which" a relevant offence has been perpetrated; paragraph 443(1)(*c*) of the *Criminal Code* covers things "intended to be used" for serious criminal purposes; this wording, although ambiguous, would seem to contemplate not only the fitness of the thing for an offensive use, but also the actual intention of its possessor to so use it. In England, where no search warrant provision as general as section 443 exists, the "instruments" of a crime have been held to be seizable at common law.[110]

92. Indications are that warrants are used infrequently to seize instruments as such. Paragraph 443(1)(*c*) appears to be used rarely, if at all.[111] One area in which instruments of crime are relevant is that of drug offences; the police may wish to seize the paraphernalia associated with narcotic or drug use, trafficking and manufacturing. Since the *Narcotic Control Act* and *Food and Drugs Act* provisions do not allow for the issuance of warrants to search for such items but only for narcotics or drugs themselves, these items did not show up in warrant documents captured in the cross-country survey. However, given the officer's power to seize these items once in possession of a warrant, they did appear in reports of seizures. Among the items often seized were pipes, scales, knives, baggies, smoking devices, and laboratory components.[112]

93. Instruments of an offence such as drug paraphernalia would in most cases constitute potential evidence of that offence; other instruments such as weapons might in themselves be illegal to possess or seizable on a protective basis. In any of these events, no discrete justification would be required for asserting the State's control over the instrument as such. The question may thus be posed: Outside of their potential status as evidence, contraband or weapons seized on a protective basis, what basis is there for the seizure of instruments of an offence? There would appear to be two distinct answers to this question on the basis of common law authority.

94. First, there is the historical notion that items, once used by their owner in the commission of an offence, must be forfeited to the State. This notion has been traced to the medieval law of the "deodand" under which objects such as wagons or swords that caused injury to an individual were seized, condemned, and after purification, sold by the Crown. In essence, a degree of fault was attributed to the object itself.[113] If this seems somewhat primitive, it is worthwhile to ask what interest is served by subsection 10(9) of the *Narcotic Control Act*, under which conveyances used in drug offences are forfeited to the Crown. The absence of a justification for retention of such conveyances, after seizure and pending conviction, was recognized by the Manitoba Court of Appeal in the *Hicks* case:

> It is possible to order that property be forfeited even though it is not in the possession of the Crown. If such property is disposed of so as to make unenforceable an order of forfeiture, that is a fact situation that may affect the sentence to be imposed on the offender.[114]

The argument can be taken a step further. If there is no compelling reason to allow the Crown to retain a seized conveyance before forfeiture, it is difficult to see why seizure of the thing ought to be allowed in the first place, unless it serves an evidentiary function. Once again, it is worth emphasizing that the service of a sentencing function, be it punishment or deterrence, is not in itself a sufficient justification for pre-trial search and seizure.

95. The other rationale behind discrete powers to seize instruments of an offence is a preventive one; indeed, this is the rationale expressed in paragraph 443(1)(*c*). The primary objection to this rationale is that it violates the sequence of crime and response to crime which this paper has adopted as a basic limitation upon intrusions. Indeed, paragraph 443(1)(*c*) itself illustrates the arbitrariness and uncertainty that potentially flow from the most careful and narrow departure from this sequence. While it is possible to identify certain types of apparatus, such as counterfeiting equipment, as things which by their nature are susceptible to criminal use, there are many items, in themselves innocuous, which may be "intended to be used for the purpose of" committing an offence. A kitchen knife may be used to murder, a pen and paper may be used to forge documents, a test tube may be used to manufacture illicit drugs.

96. We conclude that the appropriate way in which to control the possession of truly dangerous items is to enact prohibitions against their possession. In the absence of such a prohibition, an individual should not be vulnerable to intrusion before forfeiture or sentencing because of the illegal potential of an item which he

lawfully holds. A possible exception to this rule, the case of weapons that may endanger human life or safety, will be discussed later in this paper.[115] Given our general position, however, we do not include instruments of crime in the definition of "objects of seizure".

F. Persons Illegally Detained

RECOMMENDATION

3. In addition to their powers regarding "objects of seizure", peace officers should be empowered to search for and rescue persons detained in circumstances constituting an offence.

97. Besides the things or informations the State may wish to control, the object of a search may in rare cases be a person. The usual reason why the police want to obtain control over a person is that they suspect that person of participating in an offence, and wish to arrest him. Yet there may be another reason — the person may be detained illegally by another individual. Situations of detention constituting offences under the present *Criminal Code* include kidnapping[116] and hijacking.[117] The police, in such circumstances, intrude in order to rescue the person, not arrest him.

98. The only crime-related search provision under existing law that recognizes this justification is section 182, which deals specifically with women in bawdy-houses. On the other hand, the purpose is explicit in a number of provincial statutes, notably those dealing with child welfare.[118] It has been accepted in the *ALI Code* that individuals "unlawfully held in confinement or other restraint" ought to be regarded as "permissible objects of search and seizure";[119] an amendment to allow for search warrants for persons was recently made to the American Federal Rules.[120]

99. What, then, accounts for the absence of powers to search for such persons from the *Criminal Code*? The answer may lie in a perceived absence of need. To some extent, rescue efforts might well be authorized as incidental to the arrest of an offender, and in the light of *Eccles* v. *Bourque*, it is likely that a peace officer would not need a warrant to enter private premises to make an arrest.[121] Moreover, peace officers retain their residual common law authority to preserve the peace, a power that extends to entering premises without a warrant to prevent the commission of an offence that would

cause immediate and serious injury to a person.[122] Police authorities, however, informed Commission researchers of a reluctance to proceed in such cases without documentary authority. Moreover, it is not inconceivable that a victim of a *Criminal Code* offence such as kidnapping might be unlawfully detained at a different location than that at which the offender is to be found.

100. We recommend therefore that peace officers be specifically empowered to search for and rescue persons illegally detained. Due to the definitional and practical distinctions between such a power and the powers to search for and seize things, funds or information, we propose that the search and rescue power be developed separately rather than recognized in a classification of "objects of seizure". As in the case of search and seizure powers, however, the illegality of detention should be connected to a criminal offence. Otherwise, the problem arises of the potential use of a search power in lieu of the writ of *habeas corpus*. *Habeas corpus* is obtained from a superior court to test the legitimacy of a wide variety of forms of detention, including incarceration of persons committed for trial or pending deportation, confinement of the mentally ill, and custody of children. In many of these cases, the basis of the illegality is likely to be procedural impropriety, rather than the commission of an offence by the custodian. Since the basis for intrusion accepted in this Working Paper is that of responding to crime, it follows that in such cases, the search power should be inapplicable.

CHAPTER SIX

Exceptions to the Warrant Requirement

RECOMMENDATION

4. Unless otherwise specified, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. A warrant should not be required:

- **(a) for a search performed with consent obtained pursuant to Recommendations 5 and 6;**
- **(b) for a search and/or seizure following arrest as specified in Recommendations 7 and 8;**
- **(c) for a search and/or seizure in circumstances of danger to human life or safety, as specified in Recommendation 9;**
- **(d) for a search of a movable vehicle in circumstances of possible loss or destruction of "objects of seizure", as specified in Recommendation 10; and**
- **(e) for a seizure of "objects of seizure" in plain view, as specified in Recommendation 30.**

101. In defining the categories of "objects of seizure", we have identified those occasions in which an intrusive search and/or seizure is justified. We now turn to defining the procedures by which individual searches and seizures should be authorized. Our basic rule is that unless it is otherwise provided, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. Our task in this Chapter is establishing the exceptions to the warrant requirement. As indicated earlier, we maintain that there are essentially two different kinds of situation in which a search or seizure should be authorized without a warrant: situations in which obtaining a warrant is unnecessary, and situations in which obtaining a warrant is impracticable.[123]

102. The "unnecessary" standard relates basically to the understanding that searches and seizures represent intrusions upon individual rights. It follows that when the seeking of things, funds or information involves no such intrusion, it is unnecessary to confer any authorization upon the police. For example, in investigating a murder committed in a public park, the police require no exceptional power to attend at the scene, take photographs and collect physical evidence. On the other hand, such powers are relevant when the evidence of the crime is in a private home; entering the home intrudes upon the occupant's private domain. The law recognizes, however, that an occupant may consent to the entry; once the consent has been given, the entry in effect ceases to be regarded as intrusive. We address the "consent" exception to the warrant requirement in Recommendations 5 and 6.

103. The "impracticability" test, on the other hand, contemplates situations of urgency. This test is recognized, at least implicitly, in a range of powers to make warrantless searches under existing law: the common law power incidental to arrest, and the statutory provisions relating to firearms, narcotics and drugs. The question of whether this range truly or adequately comprehends situations of urgency is one that has long merited careful examination. Our own analysis suggests that there are three classifications of urgent situations in which exceptions to the warrant requirement may be appropriate: arrest, danger to human life or safety, and potential loss or destruction of objects of seizure. We address these situations in Recommendations 7 to 10.

I. Consent

RECOMMENDATIONS

5. A peace officer should be authorized to search without a warrant:

(a) any person who consents to a search of his person; and

(b) any place or vehicle, with the consent of a person present and ostensibly competent to consent to such a search.

A peace officer should be empowered to seize any "objects of seizure" found in the course of a consent search.

6. The consent should be given in writing in a document warning the person of his right to refuse to consent and to withdraw his consent at any time. The absence of a completed document should be *prima facie* evidence of the absence of consent.

A. The Need for Limitation

104. Our proposal reflects our dissatisfaction with the present law respecting "consent" search.[124] The advantages of resorting to consent as the basis of authorization for a search or seizure are many — a diminished likelihood of review, a possible psychological edge over the person searched, the less burdensome procedural requirements, and the absence of confinement to the usual "grounds of belief".[125] While the law should continue to recognize the existence of true co-operation between a peace officer and a private individual, it is important to put the matter of consent in the context which its common law history has not supplied. It is important, that is, to regard "consent" searches as an intrinsic part of the scheme of police procedures and not as privately sanctioned transactions that fall outside the concern of the public law-maker. This view has been accepted by both the Australian Law Reform Commission and the American Law Institute, in the *Criminal Investigation Bill*[126] and the *Model Code of Pre-Arraignment Procedure*[127] advanced by each respectively. It also reflects the empirical perception that police often use consent much like they use their coercive powers — to accomplish objectives pertaining to the search of suspects.[128]

105. To the extent that the law encourages resort to consent as a basis of authorization, it promotes certain objectives and policies. One obvious policy relevant to the law in this area — the recognition of the dependency of police investigation upon citizen co-operation — has received widespread emphasis in Canada. As the Ouimet Committee observed, "[t]he police cannot effectively carry out their duties with respect to law enforcement unless they have the support and confidence of the public".[129] While this recognition argues in part for keeping law in sufficient harmony with existing community values to ensure public co-operation, it also has a procedural aspect: encouraging the police to gain the co-operation of individuals rather than asserting coercive powers against them.

106. The value of reliance upon policing by consent has its limitations, however. For one thing, it has been suggested by

American sources that such reliance may have some counterproductive effect on police practice and investigations:

> The seeking of consent is often an officer's substitute for the thinking, writing and "leg work" involved in obtaining a search warrant. In this context, if consent is denied, the target of the search is put on notice that the police suspect him of wrong-doing. What then occurs is either a do-it-yourself emergency, upon which the courts look with disdain, or destruction of evidence by the alerted wrongdoer. Neither of these results is acceptable.[130]

While the likelihood of gaining the individual's consent might be expected to be a significant factor in a peace officer's decision to request it, the argument remains that by making resort to consent a more easily invoked option than a warrant application, the law discourages the police from obtaining a warrant in cases in which it might be truly appropriate. This argument is contradicted, however, by the empirical evidence that the police may often obtain a warrant as a back-up in case consent is not forthcoming.[131]

107. More significantly, the unfettered discretion to use "consent" as the basis of authorization may actually undermine the policy of promoting public co-operation with the police, if it results in submission out of apprehension rather than a true state of co-operation. An experienced Canadian criminal lawyer has observed, "[m]uch of the disrespect law violators have for authority generally can be traced to early encounters with police officers who instilled sentiments of fear into them rather than of trust and respect".[132] The Ouimet Committee, citing this observation, called for the maintenance of fairness in procedures governing police contact with the offender.[133] In the matter of the "consent" search at issue in this paper, a similar concern calls for the entrenchment of rules and guidelines to help ensure that the use of this exception to the warrant requirement is restricted to appropriate cases.

108. This approach may seem to impose an unnecessary burden on the police. If an individual is prepared to give consent to another person to enter his premises or touch his person, why should the law make the second individual subject to special constraints by virtue simply of his identity as a peace officer? The answer is that it is misleading to view a peace officer's requests for permission to enter and search premises, frisk persons and take away items consequently found, on the same footing as hypothetical requests of a similar nature from private individuals. Peace officers do not only exercise special powers; they hold a special and imposing office. Accordingly, a factor of potential intimidation is presented when a private

individual is confronted with a police request. As "consent obtained by show of authority is no consent", the danger arises that the compliance obtained from the individual is not truly consensual.[134]

109. This approach may seem to conflict somewhat with recent Canadian case-law. Notwithstanding a show of authority, our courts have regarded an individual as acting voluntarily in complying with a peace officer's request in various contexts. For example, since the *Chromiak* case it seems to be established that the response of a person faced with a demand to provide a breath sample may be considered to be voluntary.[135] Canadian authority, however, goes no further than making specific determinations of voluntariness of individual action on the facts of specific cases. It does not necessarily argue against subjecting the relevant police activity to specific statutory rules. In this regard, it is interesting to note that in *Chromiak*, the police activity of demanding a breath sample was governed by a *Criminal Code* provision.[136]

110. It may be useful to emphasize here that consent to a search or seizure is primarily relevant in legal terms in cases in which either the grounds for a non-consensual intrusion do not exist or the procedures to obtain authorization for a non-consensual intrusion have not been followed. Although peace officers may seek a person's consent as a strategic matter in cases in which they have authority for a non-consensual search, it is misleading to view consent as the legal basis for the frisk, entry, search or seizure at issue in such cases. In reality, consent is used to facilitate an activity the officer is prepared and authorized to conduct as an exercise of power. Nothing in our proposals impedes peace officers from continuing to seek compliance in such cases. Rather, our proposals affect those situations in which the authority or power to search does not exist outside of the consensual transaction. In such situations, the law envisages the individual being protected by the normal tortious and criminal prohibitions against intrusions upon private interests. Insofar as "policing by consent" entails encroachment upon such interests through acquiescence based on fear or misinformation, it undermines the force and meaning of those protections.

111. A final argument for statutory limitations is a specific application of the position advanced earlier — that the constitutional prohibition of "unreasonable search and seizure" set out in section 8 of the *Canadian Charter of Rights and Freedoms* makes it desirable to codify search and seizure procedures in conformity with the constitutional standard.[137] This argument rests on the premise that notwithstanding the existence of consent, a peace officer's intrusion

upon an individual's interests may still amount to a "search" or "seizure". This position parallels the view articulated by some American theorists that consent cases are instances of "warrantless governmental intrusions which nevertheless remain subject to the ... standard of reasonableness" set out in the American Fourth Amendment.[138] If and how the reasonableness standard in section 8 of the *Charter* is related to consent search here in Canada are questions that remain to be resolved in our jurisprudence. It seems likely, however, that a properly obtained and truly voluntary consent could establish at least on a *prima facie* basis that the search or seizure agreed to is reasonable.

B. "Voluntariness"

112. In order to be legally effective, consent must be "voluntary". This aligns the matter of consent search with legal tests applied to contexts quite apart from that of search and seizure. Most relevant to the present study are the tests applicable to confessions and to the interception of private communications. Discussion of these tests demonstrates that the degree and nature of "voluntariness" demanded by law may differ according to the context in which it is required.

113. The test of "voluntariness" for confessions was set out in the *Ibrahim* case as follows:

> It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Hale.[139]

This rule was adopted by the Supreme Court of Canada in the *Boudreau* case, in which Rand J. referred to the possibility of "doubt cast upon the truth of a statement arising from the circumstances in which it is made".[140]

114. The application of this test to paragraph 178.11(2)(*a*) of the *Criminal Code*, which allows the interception of a private communication with the consent of a party to it, was rejected by the Supreme Court of Canada in the *Goldman* case.[141] The basis of the majority decision was that certain inducements or compulsions which

could affect the truth of a confession would not influence the content of an intercepted private communication. Accordingly,

> [t]he consent must not be procured by intimidating conduct or by force or threats of force by the police, but coercion in the sense in which the word applies here does not arise merely because the consent is given because of promised or expected leniency or immunity from prosecution. Inducements of this nature or compulsion resulting from threats of prosecution would render inadmissible a confession or statement made by an accused person to those in authority because the confession or statement could be affected or influenced by the inducement or compulsion. Different considerations arise, however, where a consent of the kind under consideration here is involved.[142]

This assertion squared with conclusions reached contemporaneously in *Rosen* v. *The Queen* which concerned not a consent to intercept, but rather a consent to admit, evidence of a wire-tap at trial. In particular, the Court's observation in *Rosen* that the nature of the evidence was already "fixed and determined"[143] was cited by MacIntyre J. in *Goldman*.[144]

115. Where should the matter stand with regard to consent to search? The reasons expressed by the Supreme Court of Canada in *Rosen* may seem relevant to search and seizure as much as to interception of communications; since the evidence that might be seized is "fixed and determined", the dangers of altering testimonial evidence in response to compulsion or inducement are inapplicable. On the other hand, there are values at stake in consent search and seizure other than those of evidentiary reliability. We are concerned also that the individual in question retain effective discretion upon his private interests. While this matter ultimately must fall to be decided by case-law, we observe that to regard as consensual the acquiescence of an individual obtained through inducement, threat or manipulation would be to undermine much of the policy we have advanced here.

C. Documentation

116. The proposals we make regarding documentation represent a departure from traditional legal approaches, which have been content to let the question of voluntariness be decided on the facts of each individual case. This position has been expressed by the United States Supreme Court as follows:

> Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[145]

But while this position may be acceptable as a basic rule for *ex post facto* adjudication by courts, it does not respond to the need we perceive to regulate the actual transaction between police officer and the individual contacted. Nor does it take into account the serious evidentiary difficulties in accurately reconstructing the search incident at trial. Our proposals attempt to address these problems at least in part.

117. Documentary caution and acknowledgment procedures seek to regulate the consent transaction by giving the individual concerned notice of his right to refuse consent and maintain discretion over when and by whom his private interests may be compromised or infringed. It has been observed that Canadians seem to naturally accord legitimacy to police actions;[146] an individual confronted with a peace officer's request to search his person, vehicle or premises seems likely to assume that the police intention to conduct a search has a legal basis. Permitting this assumption to gain the actual legal foundation for the search (*viz.* the individual's own consent) is to tolerate a certain degree of finesse in police practice. In this connection it seems fair to observe that the average citizen's appreciation of the complexities of search and seizure law is understandably less than comprehensive; accordingly, the possibility that the lawfulness of a police initiative to search might be based exclusively on the consent requested might not be appreciated by the prospective consenter. An objective of our recommendation is to make the situation clear to all parties. This objective is best served if a warning to the individual is printed on the acknowledgment form; this also relieves the need for any personal onus on the peace officer.

118. Second, a written form affords clear evidence of the existence of consent. The evidentiary problems associated with consent have been recognized in many of the recent law reform initiatives undertaken in different jurisdictions. Simplifying the matter has been viewed as desirable, not only in the interests of the individual searched, who may wish to ascertain his position with respect to subsequent legal action, but also from the point of view of the peace officer; it assists him to make an informed decision as to whether to rely on consent as a basis of authorization beforehand, and to respond to any challenge to this decision after the fact.

Accordingly, the Royal Commission on Criminal Procedure in England suggested that "for the protection of the officers concerned" police officers should obtain a written consent signed by the individual.[147]

119. In the absence of any legal requirement that any document be completed in the course of the transaction by which the peace officer receives consent from the private individual, different administrative policies regarding the use of forms and cautions appear to be adopted by various police forces.[148] It is also relevant to note that while documentation is not expressly required under *Criminal Code* provisions concerned with consent to interception of electronic communications, experts in the field and police instructional materials advise officers to obtain consent in writing.[149]

120. While we recognize that there are a number of arguments that can be made against requiring documentary cautions and acknowledgments, we do not believe that these arguments refute our proposals. Many police officers commented to our researchers about the burden of more paperwork; however, it should be noted that with a properly prepared form the only person required to fill out information would be the individual affected. Some police officers also expressed the fear that by requesting confirmation of consent in writing, a peace officer might influence a consenting party to withdraw his consent. Yet some officials conceded that "a little coercion" might be involved in the unwritten consent; in this respect, we prefer the approach of another group of police officials who took the view that obtaining consent in writing would rarely be difficult in cases of true co-operation. It may be argued that production or completion of a consent form may be impracticable in certain situations; acknowledging this, we make resort to the documentary procedures a matter of evidentiary presumption as to voluntariness rather than an inflexible rule.

121. Finally, we realize that legal rules may be of limited value in achieving goals such as police deference to individual decisions not to co-operate in an investigation. Based both on empirical observations about consent search here in Canada and studies of the effects of the somewhat analogous requirements for mandatory cautions before custodial interrogations in the United States, it seems fair to query how much protection our rules will provide in everyday practice. We do not believe that the possibility of limited practical success, however, should deter us from doing what is possible at present. If the documentary procedures recommended here are

implemented and prove ineffective in practice, we concede that their utility will have to be re-examined.

122. The details and effects of obtaining written consent differ slightly from proposal to proposal among the various recent law reform initiatives. The Marin Commission has recommended that consent to searches performed by Canadian postal inspectors should be given in writing.[150] The British Royal Commission has recommended that the fact of consent be recorded in the officer's notebook and signed by the person concerned;[151] indeed, this is a course of action some Canadian peace officers have deemed to be prudent at present in the absence of legal guidelines. A comprehensive and persuasive treatment of the subject has been offered by the Australian Law Reform Commission:

> Although we do not wish to multiply unduly the number of pieces of paper that police officers must carry about with them, we think that the rights in question here are sufficiently important of protection to require that any consent on which the police rely in conducting a search should be acknowledged in writing. The absence of any such written acknowledgment would be prima facie evidence that no such notification was made or consent given.[152]

We recommend that a scheme similar to that recommended for Australia be adopted in Canada.

II. Arrest

RECOMMENDATIONS

7. Peace officers should be empowered to search a person who has been arrested if such a search would be reasonably prudent in the circumstances of the case. This power should be extended to spaces within the person's reach at the time of the search.

8. In addition to "objects of seizure", a peace officer arresting an individual should be empowered to seize:

(a) anything necessary to identify the arrested individual; and

(b) any weapon or other thing that could either assist the arrested individual to escape or endanger the life or safety of the

arrested individual, the peace officer or a member of the public.

123. The power to conduct a warrantless search incidental to arrest is a valuable and indeed necessary one. It has been justified on the basis of a number of factors, which were perhaps best summarized by Hugessen J. in the *Laporte* case: "to make the arrest effective, to ensure that evidence does not disappear and to prevent the commission of a further offence".[153] In addition to the supporting case-law on point, the legitimacy of performing searches to serve these objectives is implied by subparagraphs 450(2)(*d*)(ii) and (iii) of the *Criminal Code*; these provisions permit an officer to arrest a person without a warrant for relatively minor offences rather than compelling his appearance through a form of process, in order to either secure or to preserve evidence, or prevent the subsequent commission of a similar or different offence.

124. The issues that arise in connection with this power concern the limitations, if any, that ought to be placed on its exercise. There are three questions in this regard which we have addressed in our recommendation: (1) Should the search be authorized automatically upon arrest, or must other circumstances be present to justify it? (2) How far should the permitted scope of search extend? and (3) How far should the permitted scope of seizure extend?

A. Should the Search Be Automatic upon Arrest?

125. In theory, Canadian law appears to stipulate that a search incidental to arrest is authorized only if it is a reasonable precaution in the circumstances of the case; this position is derived from the influential nineteenth-century cases of *Leigh* v. *Cole*[154] and *Bessel* v. *Wilson*.[155] While these cases contemplate that there may be situations of arrest in which a personal search would be unfounded, Canadian courts have been decidedly reluctant to invalidate searches incidental to arrest. The issue is thus raised as to whether the additional requirement of reasonableness derived from British authorities serves any useful purpose. Once the grounds for arrest are present, should the police not be permitted to perform searches automatically?

126. This position offers the advantages of apparent simplicity and common sense, particularly when the arrest is seen as the initial step in placing an individual in institutional custody. It is misleading, however, to group together all arrest situations and attribute to them the factors obtaining in the archetypal instance of full-scale custodial arrest. A peace officer acting under section 450 of the *Criminal Code* may legitimately arrest a person suspected of the commission of a relatively minor offence, such as dangerous driving,[156] and soon afterwards, having ascertained his identity, release him with a form of process pursuant to section 452. It seems difficult to maintain that the need to perform a search in such a case would correspond to that obtaining in, for example, the situation of a robbery suspect apprehended after a chase.

127. The distinction between these two kinds of situations has been recognized in the *ALI Code*, which provides:

> The searches and seizures authorized by the other Sections of this Article shall not be authorized if the arrest is on a charge of committing a "violation" ... or a traffic offense or other misdemeanor, the elements and circumstances of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct....[157]

The exact parameters of any codified power of search incidental to arrest must take into account the possibilities of changes to the existing structures of arrest and, indeed, classification of offences.[158] It is suggested, however, that the limiting policy evident in the *ALI* provision is a sound one; it demands, at the least, that the power of search incidental to arrest should not be an automatic one in all cases.

128. A similar criticism may be advanced at a more theoretical level. To wed search to arrest is to ignore the distinct purposes that distinguish the two powers: the control of things, funds or information on the one hand, and the control over the person on the other. Laying down a rule that the former purpose can be served automatically once the latter has been achieved establishes a sequence without sense. The critical question is not: When has the freedom or dignity of the individual been sufficiently reduced to permit a warrantless search of his person or areas within his control? Rather, it is: When does the State's interest in the control of things or information outweigh the individual interest at stake? In the instance of arrest, as in all other instances, the justification for the search must come from the circumstances of the case. Accordingly, we propose the retention of the present requirement that a search be a reasonably prudent measure in order to be authorized as an incident of arrest.

B. What May Be Searched?

129. At present the power of search incidental to arrest is generally conceded to extend to areas within the control of the accused. This is a vaguely defined limitation; arguably some degree of vagueness is necessary to accommodate the exigencies of individual cases. It is useful, however, to attempt to put the matter in sharper focus by looking at the rationale for proceeding without a warrant. This rationale is the denial of access to relevant objects that may be destroyed or weapons or items that could endanger human safety or facilitate escape. This would suggest that the scope of the power should be restricted to spaces accessible to the accused at the time that the search is performed.

130. This position may appear to raise problems of uncertainty in the definition of police powers. These problems are illustrated somewhat by the American experience of fluctuating decisions on a scope of search, particularly with respect to vehicles.[159] Are all parts of the passenger compartment under the driver's control? What about the trunk? We recognize that these issues pose problems. Insofar as vehicle searches are concerned, however, this concern for clarity is met by the proposals for expanded powers outlined later in this Chapter. These proposals would give the police clear powers to search the entirety of vehicles occupied by arrested persons once requisite grounds exist,[160] and would leave as the main focus of dispute the situations in which the person is found inside private premises, such as a residence or place of work.

131. The question of the scope of search in such circumstances has been a matter of dispute in both the United States and Britain. In the definitive pronouncement of the United States Supreme Court in the *Chimel* case, it was stated:

> A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[161]

On the other hand, the Royal Commission on Criminal Procedure in England has proposed that statutory recognition be given to

warrantless searches of premises occupied by, or under the control of, a person, even if he is arrested elsewhere, with the limitation that such searches could only be performed "on the basis of suspicion on reasonable grounds" that the premises contained articles material to the offence charged or a similar offence.[162]

132. The British approach may be criticized for its failure to respect the special privacy interest in the premises which an individual occupies. The circumstances that justify the deprivation of liberty entailed by an arrest do not require that the individual automatically lose his protection against violation of his private spatial domain. The relationship between arrest powers and the violation of private domains has arisen in recent Canadian cases, which have evinced a continuing judicial resistance to allow warrantless intrusions into the private domain of alleged offenders.[163] A sympathetic concern was expressed to Commission researchers by peace officers in a number of Canadian cities who indicated that even after performing an arrest they preferred to have a warrant in their possession before searching the accused's premises.

133. We believe that the *Chimel* rule is a sound one. Although at first glance it may seem rigid and unnecessarily limited, the reach test does provide a workable definition of the area within the accused's control; indeed, extending the scope of search and seizure beyond the reach of the arrested person may create problems of definition far greater than those it solves.[164] Moreover, the adoption of this rule in Canada would leave a number of viable options open to peace officers wishing to search the premises of a party they intend to arrest: a search warrant could be obtained either before entry or after the arrest. In either case, use of the telephonic warrant procedure we recommend later might well be appropriate.[165] We conclude that the inconvenience entailed in obtaining a warrant is generally outweighed by the interests served by the *Chimel* rule.

134. One situation in which requiring a warrant might seem unduly rigid, however, is that in which "objects of seizure" are within the plain view of the officer at the time of the arrest, yet beyond the reach of the arrested person. The "plain view" doctrine, which has long been recognized in the United States, would permit seizure of items in such a situation.[166] This doctrine is discussed later in this paper.[167] Also relevant to the issue of the scope of search incidental to arrest is the matter of intimate contacts with the person. Insofar as these fall within the definition of "medical examinations", the recommendations discussed later would require resort to special procedures.[168]

C. What May Be Seized?

135. As indicated earlier, the justifications for search incidental to arrest have focused on a number of classifications of items — the fruits of a theft, evidence of the offence alleged to have been committed, and dangerous weapons.[169] At the same time, the case-law has denied the validity of seizing items unconnected to legitimate state interests attending an arrest, such as money lawfully possessed by the accused.[170] It was observed earlier that the objects of seizure associated with search incidental to arrest actually have fallen within similar categories to those objects associated with warrants to search places; the proposed definition of "objects of seizure" was intended to cover all intrusive searches, including those incidental to arrest.[171] This approach conforms to that adopted in the *ALI Code*, under which the definition of "things subject to seizure" upon arrest incorporates classifications of things seizable under warrants.[172]

136. The need to preserve safety in the context of an arrest, however, may justify expanding the scope of seizure. Although certain instruments may not fit strictly within the *Criminal Code* provisions covering illegal use or possession of a weapon, it may be a reasonable precaution to remove them from the accused at the time of his arrest. The intention in seizing such instruments is neither confiscatory nor evidentiary; rather it is solely to facilitate the exercise of the arrest power. Accordingly, we propose that, in addition to "objects of seizure", a peace officer arresting an individual should be empowered to seize any weapon or other thing that could either assist the accused to escape, or endanger the life or safety of the accused, the peace officer or a member of the public.

137. Finally, the occurrence of an arrest justifies seizure of items that will enable the police to identify the accused. Subparagraphs 450(2)(*d*)(i), 452(1)(*f*)(i) and 453(1)(*i*)(i) of the *Criminal Code* all recognize that the need "to establish the identity of the person" may justify a decision by a peace officer or officer in charge to arrest and detain an accused person instead of releasing him with a form of written process. The power to actually search the person for identification once he has been arrested has been recognized at common law.[173] We propose that it be entrenched in the regime we are developing.

III. Where Delay Is Dangerous to the Life or Safety of Persons

RECOMMENDATION

9. Where a peace officer believes on reasonable grounds that:

(a) an "object of seizure" is to be found on a person or in a place or vehicle; and

(b) the delay necessary to obtain a warrant would result in danger to human life or safety,

he should be empowered to search for and seize the "object of seizure" without a warrant.

138. Outside of arrest, the need to preserve life and safety is recognized in a number of warrantless powers. The rationale is most evident in the context of the weapons searches authorized by sections 99 and 101 of the *Criminal Code*; it has also been a factor in the common law power of entry to stop, investigate and prevent breaches of the peace. We find that this rationale is persuasive. Whenever human life or safety is endangered by the delay necessary to obtain a warrant, the sacrifice of warrant protections is clearly justifiable in order to preserve what is an overriding value. Although detaching such searches from the prerequisite of arrest entails certain risks (which we address in the discussion of Recommendation 10 below), we believe these risks are also outweighed by the value of life and safety.

139. This position assumes that the justification for intrusion accepted in this paper is established — *viz.* that the peace officer has reasonable grounds to believe that an "object of seizure" is to be found. Any weapon possessed in circumstances constituting an offence would fall within the scope of this seizure power. But while the proposed provision would accordingly subsume the warrantless powers accorded by sections 99 and 100 of the *Criminal Code*, it is more limited in certain respects than both the common law power to preserve the peace and the recently enacted provisions of section 101. The need for the additional powers afforded by these two sources is discussed later.[174]

IV. Searches of Vehicles where Delay Risks the Loss or Destruction of Objects of Seizure

RECOMMENDATION

10. Where a peace officer has arrested a person who is in control of, or an occupant of, a movable vehicle, and believes on reasonable grounds that:

(a) an "object of seizure" is to be found in the vehicle; and

(b) the delay necessary to obtain a warrant would result in the loss or destruction of the "object of seizure",

he should be empowered to search for and seize the "object of seizure" without a warrant.

140. This proposal basically extends the power to search a motor vehicle beyond the limits which would otherwise be imposed by the rule for search incidental to arrest set out in Recommendation 7. Our position here is a cautious one. On the one hand, it signifies a recognition of the exigencies of situations in which a suspect is occupying, or in control of, a movable vehicle. In such situations, as the United States Supreme Court recently concluded in the *Ross* case,[175] there is a compelling need for the peace officer's authority to be clear-cut and free of unrealistic and confusing divisions of the vehicle into zones of permitted and forbidden investigation. Accordingly, we follow the principle enunciated in *Ross* that the scope of the warrantless search of the vehicle should be as wide as that which a judicial officer could authorize by warrant. On the other hand, the proposal is significant for the powers which it does *not* confer. Specifically, it expresses our reluctance to confer warrantless search and seizure powers outside the context of arrest, even where there is a danger that incriminating objects will elude police control if an immediate search or seizure is not made. This reluctance pertains not merely to the search of vehicles but also to searches of persons and places. In this sense we have differentiated between the paramount interests of preserving human life and safety, which justified the relatively broad provisions of Recommendation 9, and the significant but nonetheless subordinate interests of preserving the "objects of seizure" themselves. For the reasons outlined below, we are not prepared to recommend the same kind of provision to meet the latter interests as we are to meet the former.

A. The Present Law

141. At present, Canadian law admits no general exceptions to the warrant requirement based on the desirability of preventing the potential loss or destruction of objects of seizure. This factor has received some attention in case-law in other contexts. For example, it was recognized in *Eccles* v. *Bourque*,[176] that in order to prevent the destruction of evidence, a peace officer may be excepted from the requirement of making an announcement before entering premises to perform an arrest. If he wishes to perform a search without a warrant in order to prevent such destruction, however, the peace officer is somewhat limited in his options. If no consent to perform the search can be obtained, and if no danger to life or safety exists, there are basically two alternatives left: invoking a special statutory power, or making an arrest and then conducting a search incidental to it.

142. Many relevant statutory powers of warrantless search and seizure are found in federal regulatory and provincial statutes that are beyond the scope of this Working Paper. Insofar as crime-related legislation is concerned, the primary example is that of the narcotics and drugs powers.[177] Due to their portability and susceptibility to disposal, narcotics and drugs are often perceived to pose particular dangers of destruction or loss. These dangers are invoked by police officers to explain why, for example, when searching dwelling houses, they prefer to resort to a writ of assistance than a search warrant. In the Law Reform Commission's survey of a writ use in Canada, 40% of officers using writs explained that they had not used a warrant due to the need to prevent destruction or removal of evidence.[178] Another instance in which the rationale of preventing destruction of evidence appears to be applied is that of warrantless seizures of evidence of gaming offences under subsection 181(2) of the *Criminal Code*. Peace officers interviewed by Commission researchers referred to cases in which peace officers "stumbled" onto a game in progress and were accordingly required to make an immediate seizure.

143. The sole alternative in instances in which no statutory search power is applicable is that of arrest. This alternative is not always an unrealistic one. At least insofar as "takings of an offence" or "things ... possessed in circumstances constituting an offence" are concerned, any belief that an individual is in possession of the relevant object of seizure may amount to a belief that the individual is committing an offence: possession of property obtained by crime, for example, or possession of narcotics or drugs.[179] However, the restriction of

peace officers to this legal alternative raises certain difficulties. Insofar as the search power incidental to arrest is limited to the area within the arrested person's control (or, as we have recommended, his reach), it does not cover other areas, such as the space within a vehicle he is driving, in which objects of seizure may be located and susceptible to loss or destruction if an immediate search is not made. Perhaps more fundamentally, the logic of recognizing arrest as a prerequisite to searches for certain objects of seizure but not others demands examination.

144. In addressing these difficulties, we look to the positions regarding the prevention of loss or destruction of objects of seizure taken in the case-law of other jurisdictions and in recent proposals from both law reform commissions and scholars. Many of these sources have expanded powers to make searches and seizures for such purposes beyond arrest situations. The additional exceptions to the warrant requirement that have been recognized, however, are generally limited according to one or more variables. Although the exact nature and mix of variables in each case differs somewhat, it is possible to identify one factor as most critical: the identity of the subject of search.

B. Different Subjects of Search

145. There are three subjects of search at issue in this Working Paper: persons, vehicles and privately occupied places, residential and non-residential. In some jurisdictions, it is recognized that the danger of loss or destruction of objects sought may justify warrantless search intruding upon some individual interests but not upon others. This differentiation may be a product of either or both of two factors: the different values placed upon different interests, and the particular risk of loss or destruction associated with each of them.

(1) *Vehicles*

146. There appears to be a consensus among other common law jurisdictions that searches of vehicles should be relatively free of the constraints of warrant procedure. This is partly because, although vehicles are private domains, they are less valued as such than places

in which the individual lives or works.[180] Attention has also been paid to the fact that vehicles, due to their inherent mobility, are likely to escape an officer's control in the time required to obtain a warrant to search them. These factors have not led to a proliferation of express powers to search vehicles without warrant in Canadian criminal law. Indeed, only section 99 of the *Criminal Code* explicitly mentions vehicles as a subject of warrantless search. In large part, this is due to the ready access peace officers gain to vehicles under provincial liquor control and motor vehicle legislation.[181]

147. The jurisdiction that has given the greatest attention to warrantless searches of vehicles is the United States. In *Chambers* v. *Maroney*, the American Supreme Court observed:

> [T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true ... if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[182]

The *ALI Code*, following in the tradition of American jurisprudence, contains this provision:

> An officer who has reasonable cause to believe that a moving or readily movable vehicle, on a public way or waters or other area open to the public or in a private area unlawfully entered by the vehicle, is or contains things subject to seizure ... may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search.[183]

A provision for warrantless searches of vehicles for objects of seizure has also been proposed by the Royal Commission on Criminal Procedure in England and Wales.[184]

148. Our Recommendation 10 does not advance an "automobile exception" to the warrant requirement as such. Rather, it responds to concerns similar to those recognized in the United States and Great Britain by expanding the scope of search incidental to arrest in cases involving a movable vehicle. In large part, our position here reflects concerns related to searches of persons. As a matter of policy, these concerns — a desire for clarity of status, and an aversion to unnecessary increments in police discretion — prompt us to tie warrantless search powers as much as possible to the prerequisite of arrest.[185] But there are two additional points, specific to the context of vehicle searches, that deserve mention now.

149. First, except for instances in which the vehicle is both unattended and unoccupied, it seems fair to observe that the search of a vehicle must frequently involve an arrest in fact: the detention of the person concerned against his will during the period of the search. We recognize that the Supreme Court of Canada decided in the *Chromiak* case[186] that in complying with a police initiative to stop the motor vehicle he was driving, an individual could be considered to be acting voluntarily and hence be unconstrained by a condition of legal arrest. But *Chromiak*, a case involving a demand for a breath sample, must be viewed on its own facts. It did not purport to establish that stops of vehicles for an investigative purpose would never involve an arrest. Given the unlikelihood that a person whose vehicle is stopped and searched would be permitted, or indeed would consider himself to be permitted, to leave the scene either with or without the vehicle, it is arguable that the ratio of *Chromiak* would rarely be applicable in cases of vehicle searches. And while it is possible to conceive of the element of detention in such cases as incidental to the exercise of the power of search, peace officers themselves often account for vehicle stops in terms of investigation of a person — an inquiry into the commission of an offence by the driver or occupant. In such cases, it seems realistic to view the primary power at issue as one of arrest (controlling the suspect), and the ancillary power as one of search (looking through the suspect's vehicle).

150. Second, there is the danger that drafting a parallel power of vehicle search outside the context of arrest will lead to inconsistent and confusing interpretation and development of the two sources of authority. In this regard, it is relevant to consider the American experience, culminating in the simultaneously released 1981 decisions in *Robbins*[187] and *Belton*.[188] In the former case, the Supreme Court invalidated the seizure of marijuana from an opaque bag in the luggage compartment of a suspect's car; in the latter case, the same Court upheld the seizure of cocaine from a jacket pocket in the passenger compartment of a car occupied by the suspect. While the significance of the source of authority for the search was not made precisely clear in either case, it is noteworthy that the former instance was analysed as a warrantless search of vehicle within the "automobile exception" and the latter was viewed as a search incidental to arrest. Given the similarity of the facts in the two cases, it is hardly surprising that the Supreme Court felt compelled within a year to attempt to resolve the resulting uncertainty by its expansion of the automobile exception in the *Ross* case.[189] While departing from the specific solution advanced in *Ross*, we agree that the American experience points out the need to clarify the powers to search

vehicles without warrant. We suggest that this objective is well served by the single power set out in Recommendation 10.

(2) *Privately Occupied Places*

151. Searches of privately occupied places, both residential and non-residential, present the least compelling arguments for exceptions to the warrant requirement in the interests of preserving objects of seizure. Unlike persons and vehicles, such premises are stationary; while evidence believed to be on the premises can be removed or destroyed in the time required to obtain a warrant, there is a negligible danger of the premises themselves disappearing. And as discussed earlier, the individual's interest in maintaining the inviolability of his private domain has long been given strong recognition in the law.[190]

152. As well as the considerations of principle applicable here, there is a pragmatic problem in establishing any generally defined power to search premises without warrant. That is the danger that such a power might be used so frequently as to render the warrant requirement meaningless in practice. Such a danger may be posed in fact by the Australian *Criminal Investigation Bill*, which permits warrantless searches of premises to prevent loss or destruction of relevant items in "circumstances of such seriousness and urgency as to require" departure from the warrant requirements.[191] The scope of the exception defined by the quoted words is imprecise, and could be construed quite widely. In this regard, it is relevant to look at the Canadian experience with section 101 of the *Criminal Code*. Although the warrantless search power accorded by this provision is limited to instances in which it would be "impracticable" to apply for a warrant, searches without warrant under the section have in fact become the rule.[192]

153. Some courts and scholars in the United States have attempted to circumvent such danger by framing warrantless powers to search premises in terms that limit their exercise to truly urgent circumstances. A list of relevant factors was set out in the Circuit Court level decision in *Rubin*, which dealt with narcotics:

> (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant.
>
> (2) [T]he reasonable belief that the contraband is about to be removed.
>
> (3) [T]he possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought.

(4) [T]he information indicating the possessors of contraband are aware that the police are on their trail.

(5) [T]he ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic".[193]

While this set of factors is undeniably comprehensive, and may be valuable for a reviewing court, it is so detailed and complex as to be virtually meaningless for a police officer faced with an immediate decision as to whether or not to perform a warrantless search.

154. The Royal Commission on Criminal Procedure[194] and the American Law Institute[195] have uniformly rejected the permissibility of non-consensual searches of premises without warrant outside of those associated with powers of arrest and, in the former case, danger to life or safety. For the reasons outlined above, we agree with their position.

(3) *Persons*

155. The greatest conflict in the present context arises with respect to searches of persons. Persons, like vehicles, are generally mobile, and similar risks of loss or destruction may flow from a failure to conduct a personal search immediately upon encountering an individual reasonably believed to be carrying "objects of seizure". On the other hand, the particular value our legal tradition has placed on the inviolability of the body serves to distinguish the two cases from each other. While a stop and examination of a vehicle, in the absence of legal authority, could amount in itself to a trespass to chattels, this wrong cannot be equated with the assaults, batteries, false arrests and other violations that could arise from an improper stop and search of a person.

156. The importance of the individual interests affected is recognized in American law, in which a warrantless search of person outside of arrest is authorized only on the basis of protection from concealed weapons and not potential destruction of other items. This approach has been supported by the argument that the benefits of warrantless search in other cases are outweighed by the potential for abuse.[196] On the other hand, the Royal Commission on Criminal Procedure in England has recommended a statutory power to stop and search persons in public places who are suspected on reasonable grounds of conveying stolen goods or being in possession of items otherwise illegal to possess:

> We believe that people in the street who have committed property offences or have in their possession articles which it is a criminal offence to possess should not be entirely protected from the possibility of being searched.... But the grounds for stop and search must be firmly based upon reasonable suspicion and the exercise of the powers must be subject to strict safeguards.[197]

157. The issue of permitting personal searches for objects of seizure in danger of loss or destruction focuses in large part on the prerequisite of arrest. The association of non-consensual personal searches with a pre-existing state of arrest is traceable to the early days of the common law.[198] This association has often been believed to afford protection to the individual; since the justification for legal arrest is limited by the requirement of "reasonable and probable grounds", it is thought that the precondition of an arrest is an effective control device by which unjustified search may be prevented. The expansion of personal search powers under statute is seen as undermining this protection. This view, for example, was advanced by a minority on the British Advisory Committee on Drug Dependence:

> In the view of the minority the abolition of the statutory power of search would undoubtedly mean that considerably fewer persons would be stopped and searched, the power to arrest being narrower than the statutory power of search. On their reckoning the proposal would involve a considerable diminution in the vexatiousness of police interference with people who are pursuing their ordinary affairs.[199]

In a way, the precondition of arrest is viewed almost as a substitute for a warrant in curbing unjustified use of personal search powers. While our position reflects this view in large part, we acknowledge that the view is open to criticism.

158. The requirement that an officer make an arrest in order to gain the legal power to search may encourage the officer to arrest as much as it discourages him from searching. The empirical evidence available is ambiguous on this point. Participant observer studies have suggested that personal search incidental to arrest often follows a decision to take formal action against the suspect, but difficulties experienced by observers in discriminating between arrests and other police-citizen encounters make conclusions from such studies problematical.[200] Some data also are provided by the self-reporting questionnaires returned in our own warrant survey. Of those personal searches performed in the course of executing warrants, a significantly higher percentage (17.4% to 11.2%) was reported as being incidental to arrest in the execution of *Criminal Code* warrants

as in the execution of *Narcotic Control Act* and *Food and Drugs Act* warrants.[201] Data from the survey would suggest that this cannot be attributed to the occurrence of more intervening justifications for arrest in the case of the *Criminal Code* warrants. The possibility exists, rather, that the police officers may have reported an arrest as the basis for search more frequently in the latter case because the statutory authority to search under the warrant did not exist, as it did in the narcotic and drug cases.

159. It may be argued that the "arrest" reported in any of these cases was merely an *ex post facto* attempt to legitimize the search. The problem is that it is difficult, on the basis of phenomenological factors to distinguish an arrest followed by a search from a simple search.[202] This may be seen to support the view that the arrest requirement imposes little restraint upon an officer who intends to search an individual; it is difficult to challenge an officer's assertion that an arrest did indeed take place prior to a personal search. Under the test set out in the leading Canadian case of *Whitfield*, the officer would merely have to show that he touched the person with a view to his detention.[203]

160. Whether the search itself may be lawful if the arrest is not is less than clear under the present law. Leigh, discussing powers of search in England and Wales, cites the New Zealand rule that "[t]he right to personal search is clearly dependent not upon the *right* to arrest but upon the *fact* of arrest".[204] On the other hand, in the early English case of *Dillon* v. *O'Brien*, the power to search was clearly predicated upon a "lawful arrest".[205] This ambiguity could be resolved by statute in favour of the latter position, thus in effect making adherence to the rules governing the exercise of an arrest power the prerequisite to the performance of a search. One wonders, though, whether these rules really add very much to the individual's protection against unjustified searches, particularly where the relevant offence is indictable. Since possession of many of the items for which an officer might wish to perform a personal search constitutes an offence prosecutable by indictment,[206] it is evident that in many cases in which an officer had reasonable grounds to search a person for an object of seizure, he would also have reasonable and probable grounds to arrest him for a relevant offence and then search him as an incident of that arrest. The only circumstances in which this rough equivalence between grounds for arrest and grounds for search would not obtain would be those in which the relevant offence was merely punishable by summary conviction, in which case the person could only be arrested if "found committing" an offence.[207]

161. It is possible that the prerequisite of arrest makes little difference to the exercise of powers of search, at least in relation to indictable offences. In consulting police officers from various Canadian forces, our researchers were told that whether the object of the search was a narcotic or drug (for which a statutory power of personal search currently exists) or stolen property (for which personal search is authorized only in conjunction with arrest), the officer's rule of thumb is "reasonable and probable grounds", a test often satisfied in practice by gut feelings. On the other hand, the frequent reference of police officials to "reasonable and probable grounds", a standard specifically associated with arrest rather than search and seizure, would suggest the existence of an association between the two powers, an association that may have some limiting effect. Considering this possibility alongside the evidence from participant observer studies that searches generally follow decisions to take formal action against suspects,[208] we are not prepared to concede that the prerequisite of arrest is meaningless as a device to help ensure that the exercised powers of personal search are confined to justifiable instances.

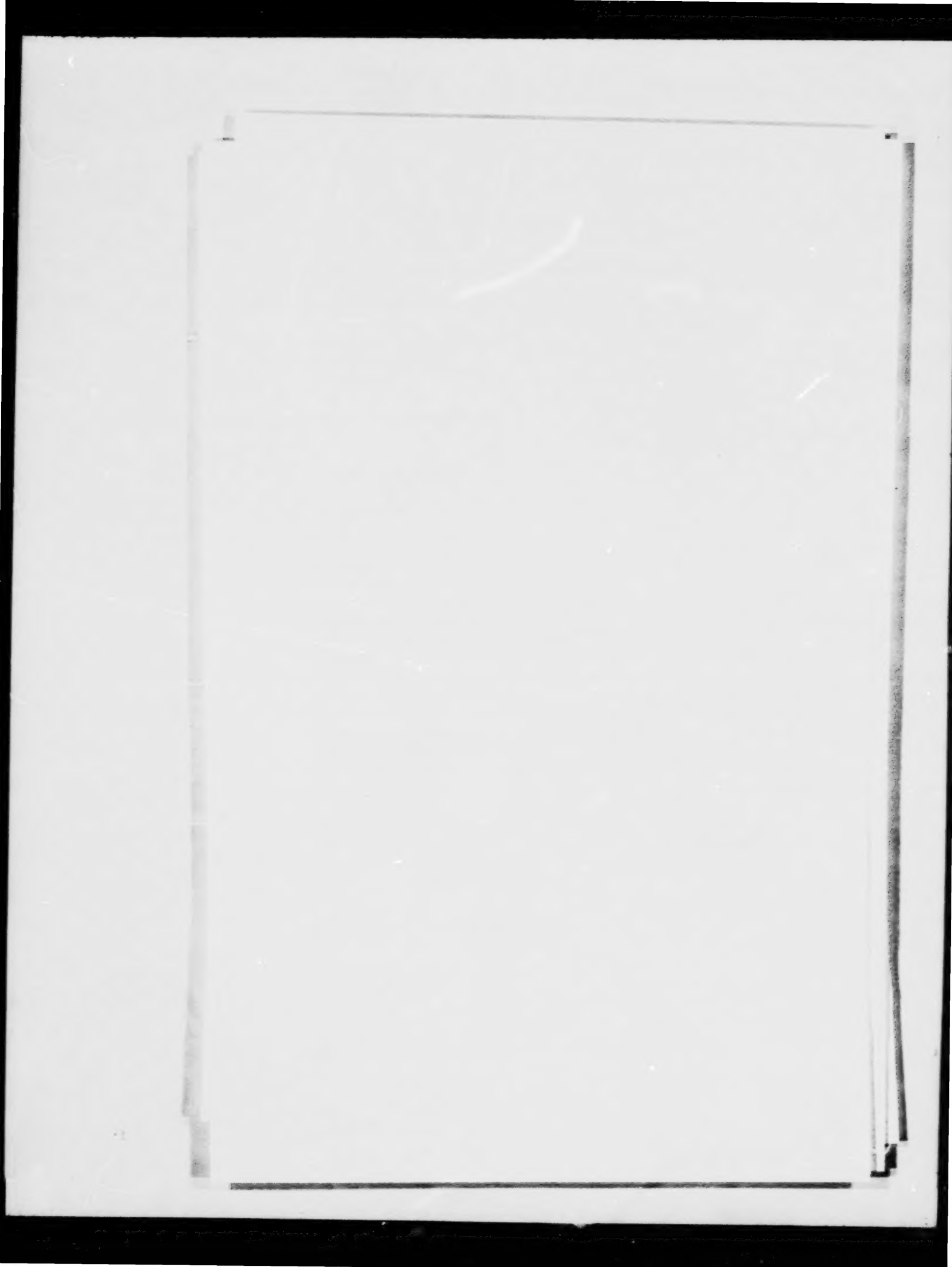
162. If our position appears to reflect an abundance of caution, this is because we believe that caution in this area is well founded. While a theoretical basis for a discrete power of personal search unquestionably exists, and while the recent trend in Great Britain and Australia has been towards the recognition of such powers, it is important to weigh very carefully the risks entailed in establishing them. In England itself, the Scarman Report has recently documented the activities of peace officers involved in search operations to recover stolen goods. Notwithstanding the limitation of the relevant powers to instances in which reasonable suspicion pertained to the persons searched, it was found that the exercise of powers during the operation was sweeping.[209] While no such operations have been found to occur in Canada, incidents and programmes of random personal search for narcotics have been observed by both government Commissions[210] and legal commentators.[211] While the objectives of the police in carrying out these programmes may be laudable, granting peace officers wide powers to conduct them conflicts with the specific, responsive character of criminal law enforcement intrinsic to Canadian traditions.

163. Moreover, quite aside from the question of impact on police activities, there is a useful purpose served in conferring the status of arrest upon a person who has been detained for the duration

of a search and seizure. Two consequences seem relevant. First, informing the person that he is arrested forewarns him of the illegality of any attempt to resist or elude the peace officer; this objective seems particularly significant in the light of recent Canadian case-law which leaves open the possibility of a suspect, free from any legally recognized form of compulsory restraint, being subject to criminal prosecution for such attempts.[212] In addition, the existence of a state of arrest may bring into play certain provisions of the *Canadian Charter of Rights and Freedoms*, a contingency discussed later in this Working Paper.[213]

C. Conclusion

164. Recommendation 10 is a tentative one for a number of reasons. Insofar as the need for an alternative to the powers of search and seizure incidental to arrest is dependent upon the scope and design of arrest powers themselves, we are mindful of the possible ramifications which could flow from our forthcoming Working Paper on Arrest. Perhaps more fundamentally, we are aware that any proposal dealing with this subject touches upon sensitive and significant areas of police practice and individual privacy. During discussions within the Commission, we have weighed a number of alternatives, including a discrete power to make searches and seizures without warrant, analogous to that set out in Recommendation 9 but covering the risk of loss or destruction of objects of seizure. Such a power could be fashioned so as to be more limited than Recommendation 9. It could be restricted, for example, to coverage of searches of persons and vehicles, but not places, or it could be applicable only when the object sought related to the commission of an indictable offence. While we have refrained from proposing such a power at this time, we welcome criticisms and comments as to the merits of our present position.



CHAPTER SEVEN

Procedures

165. This Chapter develops a scheme of rules covering search and seizure procedures in the following way. It begins by tackling the various problems arising in connection with the issuance and execution of warrants. It then moves on to consider problems relating to the execution of searches and seizures in general. Finally, it deals with two specific sets of issues: those relating to searches of persons, and those relating to questions of access to information about searches and seizures.

I. Issuance of Warrants

A. The Nature of the Procedure

RECOMMENDATIONS

11. A justice of the peace should be empowered to issue a warrant to search a person, place or vehicle if there are reasonable grounds to believe that the person, place or vehicle is carrying, containing or concealing an "object of seizure".

12. Except as authorized in the telephonic warrant procedures set out in Recommendation 19, the application for all search warrants should be an information in writing sworn under oath. The issuer should be empowered to question the applicant to ascertain additional

facts underlying the application. However, if such facts are relied upon in the adjudication of the application, they should be attested to on the face of the information.

166. These recommendations express in general terms the procedure for issuing warrants. Many of the aspects of this procedure require special attention and are discussed in detail in subsequent recommendations. First, however, it is valuable to look briefly at the general nature of the search warrant procedure we propose.

167. At present, the issuance of a search warrant is almost exclusively a documentary procedure. If the application documents are complete and proper, there is no onus placed upon the issuer to perform such adjudicative tasks as asking questions of the deponent, or checking the credibility of his sources. Conversely, if the contents of the documents are not sufficient, the applicant cannot remedy this through an oral presentation. As Roach J.A. stated in *Re Worrall*,

> mere conversations between an informant and a Justice of the Peace can form no part of the basis on which a search warrant may issue. If there is something lacking in the sworn information that deficiency cannot be supplied by some conversation between them.[214]

168. The emphasis on documentary preparation serves several useful purposes. It encourages police officers to put their own case in order, rather than relying on sympathetic justices to extract the essential facts. Moreover, the documentary application, at least in those regimes that require reasonable grounds to be present on the face of a written information, provides a basic and easily accessible record of the proceedings before the issuer. An individual wishing to challenge the legality of issuance, rather than being forced to wait for a transcript of an application hearing to be prepared, need only obtain the already existing written information in order to ascertain the formal, substantive and probative sufficiency of the application.

169. On the other hand, the "rigidification" of documentary procedure can have a distinctly counter-productive effect if it encourages the issuer to assume a merely clerical role. In *Re Den Hoy Gin*, the Ontario Court of Appeal indicated its willingness to go behind the face of a false sworn information to quash a search warrant.[215] However, the present law in Canada has stopped short of urging the issuer himself to make inquiries as to the veracity of the claims made on the face of the information. This contrasts with the American position which, for example, precludes an issuer from relying solely on the applicant's assertion that his informant is trustworthy, truthful, prudent, reliable or credible. Indeed, American

Federal Rule 41(c) allows an issuer to "examine under oath the affiant and any witness he may produce".[216]

170. If a lack of inquisitiveness on the part of the issuer allows unsupported assertions to remain undetected, it may also result in subsequent problems for the police. By failing, for example, to demand an elaboration of terse or ill-defined "reasonable grounds" before issuing a search warrant, the issuer leaves open the possibility that a reviewing court may eventually quash the warrant for its insufficiency in this respect. It may well be that the officer has additional reasonable grounds but, out of reluctance to elaborate or because he believes that only a minimal disclosure is required, he has refrained from putting them in writing. For the issuer to make some inquiries here would be quite natural. In *Campbell* v. *Clough*, the applicant failed to detail his reasonable grounds for belief; however, the justice was able to ascertain the circumstances of the investigation through questioning, and noted these on the information. "In this respect", held McQuaid J., "I am of the opinion that she [the justice] not only acted prudently, but also judicially as she is required to do".[217] While some judges and justices indicated to Commission researchers that they follow this practice, the documents collected in our warrant survey show that this is the exception. For example, the existence of a 52.3% success rate in seizing an object sought would suggest that police in Montréal often do have a reasonable order of belief that the object sought is in fact in the premises named;[218] one would be hard pressed to ascertain this, however, by looking at the written informations captured in the Commission's survey.

171. It may be argued that such participation by the issuer undermines his neutrality. If the police present a deficient application, runs the argument, they should bear the consequences. The argument, however, confuses judicial inquisitiveness with partiality. Although there is clearly a point at which an issuer's questions become a crutch to a sluggish police officer, inquiries designed to test assertions and seek out latent details stop well short of that point. Such inquiries cut both ways: if the details are available, the issuance of the warrant may be supportable; if they are not, it may be precluded.

172. Inevitably, the discussion of appropriate authorization procedures must be linked to a discussion of enforcement or review mechanisms. Reviews of search and seizure have generally focused on the legality of the process, which has in turn been based on its documentation. The avenue of challenging the legality of a search or a

seizure is one this Working Paper accepts as essential. To facilitate the review of legality, the documentary emphasis of the warrant procedure must be retained.

173. This does not mean, however, that the issuer ought to be restrained from asking questions designed to elicit the true basis of the application. So long as any additional details elicited through interrogation and relied upon in issuing the warrant are included on the written application and properly attested to, an individual affected by the search is not truly prejudiced by the justice's inquiry. On the contrary, the warrant becomes a more judicial form of protection against unmerited intrusions against the individual.

B. Documentation

RECOMMENDATION

13. Standard statutory forms should be drafted so as to eliminate the problems of improvised drafting that currently exist. These forms, unlike the current Form 1, should truly guide the officer in setting out the details the law requires. "Legalese" should be rejected in favour of comprehensible language. Guidelines used by the police should stress the need for thoroughness on the information and warrant rather than on exclusively administrative documents.

174. Despite the present emphasis on documentary completeness, the statute books provide little in the way of valuable guidance as to the documents police officers ought to use. The only model forms provided are those in the *Criminal Code* pertaining to the section 443 information and warrant. The presentation of the model information in particular is problematical, in that it involves a certain degree of paradox. While section 443 makes resort to Form 1 mandatory, Form 1 itself falls short of fulfilling the substantive and probative standards of this same section. In *R.* v. *Colvin; Ex parte Merrick*, Osler J. observed:

> It is to be observed that the use of Form 1 appears to be mandatory, although the actual form when examined leaves much to be desired.... [T]he section ... requires that the Justice must be satisfied that there is in such place something "... that there is reasonable ground to believe will afford evidence with respect to the commission of an offence ..." and the Form provided does not give much assistance in this respect. In

consequence, the person filling out the Form is obliged to complete a sentence commencing "The informant says that", following which he should, presumably, state that there is reasonable ground to believe that certain articles will afford evidence of a certain crime.[219]

175. As was noted earlier, various attempts have been made to modify Form 1 to comply with section 443.[220] Moreover, due to the lack of statutory models for the other warrant procedures, local officials have had to improvise appropriate forms, often by making modifications to the section 443 forms. In both cases, the products of local initiative have varied considerably, leading to a number of consequences.

176. First, erratic documentary practice has had its impact on formal validity. In particular, there has been confusion of section 443 and *Narcotic Control Act* and *Food and Drugs Act* requirements. For example, in our warrant survey in 1978, Edmonton, Winnipeg and Montréal all yielded narcotics and drugs warrants that failed to name the executing officer; often a general direction to peace officers in the relevant district, permissible under section 443 but not under *Narcotic Control Act* and *Food and Drugs Act* provisions, was used instead. This error is not a grave one by any means, but, in that it violates recognized legal standards, it represents an apparent inattentiveness.[221]

177. Second, the form of the document tends to influence the presentation of the substantive and probative details on the application. Even if the statutory requirements are followed to the letter, the spacing and structuring of the various elements may discourage meaningful disclosure. In the case of Montréal, for example, 33 out of 35 sets of documents relating to section 443 were found to be formally sufficient, yet the forms used by the Peace and Crown Office help to explain why only 4 out of the 35 were adequate in other respects; the space allotted to the description of "reasonable grounds" was minuscule. Subsequent to the completion of the survey, however, some attempt was made to rectify this problem through the incorporation of sworn appendices to the information. In Vancouver, on the other hand, the form was structured openly so as to encourage expansiveness where necessary; it is not surprising, then, that 28 out of 35 section 443 warrants issued in Vancouver provided satisfactory "reasonable grounds" in the eyes of the judicial panel.

178. Two rather simple prescriptions for action emerge from the above comments. First, standard forms ought to be provided and indeed made mandatory with respect to every warrant procedure, so

as to avoid the problems of local improvisation evident in the practices related to special procedures. If different regimes must be maintained for certain situations (a contention this paper questions), then the incoherence they produce should be minimized through the provision of special documents designed with the individual regimes in mind. Second, these forms ought truly to guide the officer in setting out the details the law requires. Exactly what details should be required will be discussed in the following sections; however, even if no alteration in the existing statutory provisions were to be made, it would be desirable to restructure Form 1 of the *Criminal Code* to meet this objective.

179. To make the documents used legally precise, however, is not enough. Even where information and warrants are structured properly, they often contain language that may make them intimidating and incomprehensible to the individual concerned. The value of warrants lies in part in the use of the document to inform the party searched of the legal status of the search.[222] Yet, that status is obscured by the arcane jargon used in the *Criminal Code* forms: "whereas", "hereinafter", the adjectival "said". The use of "legalese" has been attributed to a perceived need to "handle exceedingly specific details and relations between them".[223] There is no question that search warrant documents must often portray specific and complex details; on the other hand, it is possible to draft forms that accommodate these details in a relatively comprehensible manner.

180. Finally, there is the question of the onerousness of documentary requirements. Do they impair police efficiency? Officers in a number of Canadian police forces expressed the opinion to Commission interviewers that their paperwork was becoming overwhelming. In Winnipeg, for example, officers estimated that one hour was needed to prepare each set of warrant documents under section 443. This estimate, of course, is subject to variation according to the circumstances of each application. An information for a complex commercial crime warrant might take literally days to prepare, while a terse set of documents relating to a stolen goods offence might take less than twenty minutes. Some of the police complaints related to the necessity of duplicating descriptions of offences, items and premises on the application form and the warrant. As the Montréal Crown and Peace Office practice shows, it is quite possible to eliminate this inefficiency through the use of carbons and appropriately designed forms. The design ought not to be such, however, as to render the probative basis of issuance less than "judicial", or the definitions of items, offences or premises less than "particular".

181. Montréal also serves as an illustration of how police administrative procedures, rather than legal requirements, can add to an officer's paperwork. In addition to the warrant documents, municipal peace officers have been required to fill out separate forms for administrative use in which the circumstances of proposed searches are repeated. Not only does such duplication seem unnecessary; it may also de-emphasize the importance of the warrant documents themselves. It is recommended that documentary procedures used by the police should stress the need for thoroughness on the warrant documents rather than on documents for internal use.

C. Judicial Discretion and Refusal to Issue a Warrant

RECOMMENDATION

14. A peace officer applying for a warrant should be required to disclose on the information form any previous applications made with respect to the same warrant (*viz.* a warrant to search the same person, place or vehicle for "objects of seizure" related to the same or a related transaction).

182. Under subsection 443(1) of the *Criminal Code*, the issuer "may" issue a warrant if the information affords the requisite "reasonable ground to believe". As Fontana observes, this implies a discretion to refuse to issue the warrant notwithstanding the sufficiency of the information:

> Implicit in the wording of the section through the use of the word "may" is the discretionary element of the definition. A justice presented with the information properly sworn as required, and even though being "satisfied" within the terms of the section, may still refuse to issue the search warrant. It then rests with the applicant to pursue his application by other means.[224]

This discretion is also given to the issuers of warrants under sections 101, 181, 182, 353, and the narcotic and drugs provisions. On the other hand, judges performing functions under sections 160 and 281.3 of the *Criminal Code* are given no apparent discretion. The sections provide that they "shall" issue a warrant when satisfied as to the existence of the relevant grounds for believing.

183. We propose that as a general rule the issuance of the warrant should continue to be discretionary. The existence of discretion conforms with the "judicial" role this paper deems appropriate for the issuer and provides a context within which a number of factors relevant to issuance may be considered. Some of these factors relate to the status of the party to be searched. The fact that a party to be searched is a newspaper not believed to be implicated in the relevant offence does not alter the existence of reasonable grounds to believe that objects of seizure may be found inside. As suggested in the *Pacific Press* case, however, it may be relevant to deciding whether a warrant ought to be issued to search the premises.[225] Discretion may also be relevant in cases of doubt as to the accuracy of sworn assertions. Such doubt does not affect the apparent "reasonableness" of the grounds on the face of the information. However, it should entitle an issuer to refuse to issue the requested warrant.

184. Retaining judicial discretion marks a certain faith in the capacity of issuers to conduct meaningful hearings into warrant applications. This faith is not entirely justified by the results of our search warrant survey and it might be wondered whether it is not naïve to rely on it. Participant observer studies of detective work not only indicate that justices who fail to co-operate with the police are subject to considerable pressures to do so, but advance the possibility that truly "judicial" issuers are the exception rather than the rule.[226] The fact is, though, that the judiciality of the proceedings is not an option that can be revoked at will. Rather, it is a basic objective of a warrant procedure, and if the attainment of that objective is regarded as hopeless, not merely the existence of judicial discretion, but the basic structure of the proceeding, is of dubious worth.

185. One aspect of warrant issuance that may be perceived to undercut the "judicial" nature of the proceedings is the practice of forum-shopping. At present, if a peace officer's application for a warrant is refused, he may reapply for the same warrant on a subsequent occasion before the same or another adjudicator.[227] It may be argued that the exercise of judicial discretion against an applicant is rendered sterile by legal tolerance of this situation. On the other hand, we do not accept that the same "double jeopardy" considerations underlying the application of *res judicata* doctrines at subsequent proceedings truly obtain at the investigative stage of search and seizure. Circumstances may change after an initial application for a warrant; evidence supporting the application may become firmer. Moreover, we recognize that if an initial refusal to

issue a warrant were to be binding in relation to an investigation as a whole, this could inhibit adjudicators from ruling against applications perceived to be insufficient.

186. Accordingly, we propose a balanced solution, one that gives appropriate recognition to a refusal to issue a warrant, yet does not make the consequences of such refusal inimical to judicial discretion. Such a balance is found in paragraph 178.12(1)(*e*.1) of the *Criminal Code*, which requires the following information to be included in an affidavit supporting an application for an authorization to intercept electronic communications:

> [T]he number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit ... and on which the application was withdrawn or no authorization was given, the date on which each such application was made and the name of the judge to whom each such application was made; ...

We recommend that a similar requirement be included in applications for search warrants.

D. The Test to Be Met

RECOMMENDATIONS

15. A peace officer applying for a warrant should not be required to reveal facts disclosing the identity of confidential sources. However, this policy should not permit warrants to be issued on the basis of applications that fail to meet the "reasonable ground" test.

16. Section 178.2 of the *Criminal Code* should be amended so as to make clear that peace officers are not precluded from disclosing facts obtained from an intercepted private communication in the course of search warrant applications.

(1) *Reasonable Grounds to Believe*

187. The traditional test for the issuance of a search warrant is the demonstration under oath of reasonable grounds to believe that a specific item, related in a designated way to a specific offence, may be found in a specific location. The test incorporates both the

"judiciality" and "particularity" features associated with the warrant, features that empirical evidence suggests are often absent from the procedure in daily practice. Although some degree of vagueness characterizes the articulation of the test, it seems that the real problem lies not in the test itself, but in its application.

188. The test is quite readily broken down into its particular and judicial components. The specifications of the items, offence and location comprise the former; the reasonable grounds, the latter. Although there has been some inconsistency in the application of the particularity tests, and indeed some disagreement over the exact standards of particularity required, the basic issues are fairly settled.[228] The descriptions must be sufficiently detailed to assist the issuer in making a judicial decision and, when carried over into the warrant, to both guide the executing officer, and inform the individual concerned as to the scope of intrusion permitted.[229] While it is possible to quarrel with certain inconsistencies in the case-law, the existing standards are relatively uncontroversial.[230] It is, rather, in connection with the "reasonable grounds" themselves that the major problems have arisen.

189. What are "reasonable grounds to believe"? A number of courts have taken stabs at the question, often comparing the test to other legal standards. It is clear, for example, after *Re Newfoundland & Labrador Corp. Ltd.*, that the standard imposes a lower burden than "proof beyond a reasonable doubt".[231] But such semantic ordering does not really answer the question. Perhaps the best way to regard the test is as a guide. To the degree that "reasonableness" incorporates the standards of objectivity and thoughtfulness inherent in judiciality, it conveys sufficiently the duties the issuer should have in mind.

190. There is no doubt that the "reasonable grounds" test has been inconsistently applied, not only by issuers of warrants, but also by reviewing courts. For example, in the recent Québec Superior Court decision in *Abou-Assale*, the words "investigation conducted by the Royal Canadian Mounted Police" were held to satisfy the standard.[232] Yet the same Court fifteen years earlier in *Regency Realties Inc.* v. *Loranger* had rejected "information from a trustworthy person" as insufficient in this respect, commenting that this provided "no serious enlightenment".[233] In light of such conflicts, it is perhaps not surprising that issuers of warrants in Montréal followed a relaxed standard.[234] It is difficult to distinguish such decisions on the basis of the "circumstances of the case"; the circumstances are often virtually identical. To some extent, such

conflicts are inevitable, reflecting different priorities of various judges and various courts. However, common identifiable problems do crop up in the course of establishing reasonable grounds, and it is useful to outline basic principles for dealing with them. Two of these problems are the reliance of warrant applicants upon facts provided by confidential informants and by intercepted communications.

(2) *Confidential Informants*

191. The current Canadian position on confidential informants was set out in the *Lubell* case, in which Zuber J. upheld a warrant issued on "information from a reliable source":

> It is trite law that the Crown enjoys a privilege with respect to the disclosure of the name of informants and obviously this is the reason for taking refuge in this type of language.[235]

It may be argued that this position sacrifices too much of the fact-finding duty inherent in judiciality to police interests in concealing the facts. On the other hand, the identity of the informant is a matter that even at trial is generally protected from disclosure on the grounds of public policy. This policy is founded on the basis that anonymity encourages informers to communicate information about criminal offences to the government.[236] And while the identity of the informant may reflect upon the credibility of the assertions by the applicant for the warrant, protection of that identity does not entail complete frustration of the issuer's judicial duty.

192. There is a distinction between protecting the name of the source from disclosure, and protecting the grounds of belief yielded by the source from scrutiny. This distinction was recognized in the Newfoundland Court of Appeal's decision in *Re Newfoundland & Labrador Corp. Ltd.* "Surely", held the Court, "information in Form 1 in which the informant deposes to specific facts, knowledge of which he obtained [from a confidential source] is information upon which the justice could be satisfied that reasonable grounds to so believe existed".[237] This position is sound. To fall short of it is to compromise the issuer's control of the search in favour of police discretion. We recommend, therefore, that while informant privilege should continue to be recognized at warrant hearings, it should be limited to its proper scope. While the identity of the confidential source should continue to be protected from disclosure (through the use of aliases and code names if necessary), the applicant must still provide the factual assertions necessary to satisfy the "reasonable grounds to believe" test.

(3) *Grounds Based on Intercepted Communications*

193. A somewhat related problem arises when police wish to perform a search on the basis of factual information received from a wire-tap. As a matter of principle, there is no reason why the "reasonable grounds" standard should not be applied to such information. However, the police are often reluctant to disclose both the information itself, and the fact that it was obtained by wire-tap, not only because of the possibility that the future success of the tap will be jeopardized, but also because of the statutory prohibition against disclosure of the existence of an intercepted private communication.

194. Subsection 178.2(1) of the *Criminal Code* reads:

> Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> (*a*) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (*b*) discloses the existence thereof,
>
> is guilty of an indictable offence and liable to imprisonment for two years.

Results of the Commission's warrant survey and subsequent consultations suggest that the interpretation of the prohibition under this provision varies somewhat from city to city, and even within some forces. Some officers prepared informations referring to an "interception of private communications of persons whose names cannot be presently revealed". A number of police officials took the view, however, that a police officer could not even tell a justice of the peace of the existence of the tap without contravening subsection 178.2(1). While subsection 178.2(2) makes the prohibition inapplicable to "criminal proceedings" and "other proceedings" in which "evidence on oath" is required, local officials were not confident that this exemption covered search warrant applications.

195. The interrelationship between section 178.2 and search warrant requirements deserves clarification. For one thing, the section is expressly an effort to protect the privacy of the originator of the intercepted communication against disclosure to third parties. It is *not* directed to withholding information about police activity

from the parties to the communication themselves. This latter purpose is recognized in section 178.23, which permits delays in written notification to affected persons. Given that there is some ambiguity, however, it may be advisable to amend subsection 178.2(2) to specify that subsection 178.2(1) does not apply to search warrant proceedings. A provision designed to protect the privacy of the individual ought not to stand in the way of another provision with like intent.

196. This begs the larger question: To what extent should the existence of a wire-tap affect the application of the "reasonable grounds" test? It is suggested that this circumstance, like reliance upon a confidential informant, does not justify departing from the requirement that the peace officer provide the justice with facts supporting the application for the warrant. Indeed, the present reluctance of police officers to divulge the existence of a tap has meant that reviewing courts treat informations prepared in the wake of electronic surveillance the same as other informations.[238] This consistency in application should be continued, not only by reviewing courts, but by issuers of search warrants as well. While it is true that Parliament has placed a premium upon guarding the clandestine nature of wire-tapping, most notably through the delayed notification provision of section 178.23, there is a danger in pyramiding secrecy requirements on top of each other. Taken to its extreme, the need to maintain the secrecy of a wire-tap could argue for secret inquiries and trials.

197. As in the case of confidential informants, the distinction should be made between disclosing facts pertaining to the identification of the wire-tap, and facts received from the wire-tap about the existence of criminal activity. It is the latter category of facts, not the former, that establishes the requisite "reasonable grounds to believe". Any prejudice to an ongoing tap caused by disclosure of the latter category in the written information is likely to occur in any event as a result of executing the warrant. It is difficult to believe that an individual whose premises have been searched by police officers would not be so alerted to the possibility of electronic surveillance.

E. The Issuer

RECOMMENDATION

17. The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. Steps should

be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the *Criminal Code*. New provincial initiatives should be undertaken to examine the office of justice of the peace and either abolish or reorganize it where necessary.

198. The issuers of search warrants, at least those under sections 443 and 181 of the *Criminal Code* and the *Narcotic Control Act* and *Food and Drugs Act* provisions, are failing to maintain the legal standards governing the performance of their duties. The question is thus raised as to whether the responsibilities for issuance ought to be shifted to officials other than those designated under present legislation.

199. Most crime-related warrant regimes name a justice as issuer of the warrants.[239] Under section 2 of the *Criminal Code*, "justice" includes a magistrate as well as a justice of the peace, and under some provincial enactments, superior court judges have been granted *ex officio* status as justices.[240] In practice, according to the Commission's warrant survey, issuance duties appear to be shared by justices, magistrates and judges of the various provincial courts. One province covered by the survey, New Brunswick, has abolished the office of justice, and the search warrants we captured in that province were issued exclusively by Provincial Court judges.[241]

200. A frequently voiced opinion is that justices of the peace do not have the impartiality or competence to issue search warrants. The Kirby Report on the *Administration of Justice in the Provincial Courts of Alberta* put the point bluntly:

> It is possible to lay an information for a search warrant before clerks or police officers who have been appointed justices of the peace. Since the granting of a search warrant is a judicial act requiring judicial competence, impartiality and independence, justices of the peace should not have the power to grant such warrants.[242]

The Report suggested that search warrants should only be issued by Provincial Court judges. While this suggestion has much apparent force behind it, there are two points that should be considered.

201. First, the empirical evidence available from the Commission's survey suggests that giving Provincial Court judges exclusive jurisdiction would not in itself have a decisive positive impact. In New Brunswick, the validity rating of the twelve warrants, which were issued exclusively by provincial judges, was *lower* than in the other provinces (27% to 39%).[243] Vancouver, the city with the best

validity record, utilized only justices of the peace in warrant applications. In Edmonton, the one city in which it was possible to compare the validity rates of warrants issued by justices and those issued by Provincial Court judges, the justices fared only slightly worse than judges (33% to 35%). Due to the small size of the samples, these statistics are of limited value, but they do suggest that it is misleading to put much faith in the label or status attached to the official. What must be considered, rather, is the qualification of the official for his assigned function, and the appropriateness of the administrative structure surrounding him.

202. Second, it is arbitrary and narrow to view adjudicative functions of justices in terms of search warrants alone. Although the consequences of the issuance of a warrant are undeniably severe, the justice has other functions that can result in even more drastic consequences for individuals affected. Under existing *Criminal Code* provisions, he may issue arrest warrants, order accused persons to be detained in custody, conduct preliminary inquiries, make committal orders, and try summary conviction offences.[244] To strip the justice of his search warrant powers while leaving the rest intact is to miss the real issue: Is the office as currently constituted a proper repository of significant judicial responsibilities?

203. It is notorious that many justices are closely associated with the police officials who make applications to them. Many indeed are former police officials with minimal legal training. The air of casualness that can develop in such circumstances was illustrated in an incident described in the Pringle Report, in which two police officers obtained two warrants from a justice who had formerly been a police officer. When requested to present the informations that had been sworn to obtain the warrants, the justice could not do so, explaining that there were no guidelines that required him to retain the documents after the warrants had been issued.[245] This lack of perception as to basic judicial standards has led many observers to question the fitness of many justices for their office.[246] On the other hand, at least one province has developed a system of justices of the peace that treats adjudicative responsibilities seriously. British Columbia demonstrated to Commission researchers an organization in which justices were brought up through the court administration system, selected by a judicial council, and given the benefit of continuing education programmes concerning their duties.

204. The problems that arise are not simply ones of individual competence. One must also question the validity of doing what the warrant process has purported to do since the days of Hale — give a

judicial function to an officer whose position is often less than independent. Statutes in some provinces make Crown lawyers "advisers" to the justices;[247] in this capacity, Crown counsel have influenced dispositions of privately sworn complaints. Does this right to "advise" extend to applications initiated by the police? The legislation would appear to countenance this situation, leaving the justice in a position of potential conflict: he might have to decide, "judicially", an application in relation to a case his adviser is likely to prosecute.

205. The issues of appointment, qualification, instruction and responsibilities of justices have been studied extensively in Great Britain;[248] and recent American jurisprudence has been scrupulous in attempting to ensure neutrality on the part of the issuer, going so far as to invalidate warrants issued by state Attorneys General acting as justices of the peace.[249] In Canada, the matter has received some attention at the provincial level, where constitutional jurisdiction over Provincial Court judges, magistrates and justices resides.[250] The problems of the offices of the issuers of search warrants differ from locale to locale, as do the traditions of the office, and it is not intended to present an ideal formula here. But whether the problems are resolved through abolition of the position of justice or improvement or reorganization of the office, it is important that the provinces undertake the initiatives necessary to implement effective changes. Search warrant issuance, like other adjudicative functions under the *Criminal Code*, is only as judicial as the persons responsible for it.

F. The Participation of Crown Counsel

RECOMMENDATION

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown's participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown's participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

206. At present, there is no formal requirement that Crown counsel be involved in the application for a search warrant, and in

most cases the peace officer proceeds to obtain one without a lawyer's assistance. The notable exception occurs in instances of searches connected with allegations of commercial crime. Crown counsel or privately retained lawyers may in fact be aiding the police in their investigation before the search is undertaken, and their legal expertise is often considered valuable in the preparation of warrant documents. The documents prepared in such cases are comprehensive and detailed, a circumstance which suggests that the quality of the applications, and hence the warrant issuance system in general, would be improved if legal counsel played an increased role in the procedure. Recognizing this likelihood, the Kirby Report suggested that all applications for search warrants in Alberta be made by Crown prosecutors.[251]

207. Aside from the pragmatic reasons for participation by the Crown, there is a principled argument that can be made — namely, that since the day-to-day administration of the criminal law is under the control of the Attorney General's department, a representative of that department ought to be present when a decision is made to enforce the criminal law by invoking warrant procedures. Indeed, such a monitoring role is envisaged by section 281.3 of the *Criminal Code*, which requires the Attorney General's consent before proceedings are instituted to obtain a warrant to seize hate propaganda. Should such a requirement become a general rule?

208. In our Working Paper, *Control of the Process*, we placed an onus upon the Crown to participate in all "prosecutorial" functions. The Commission extended this responsibility to the stage of compelling an accused's appearance in court. It was irrational, it was argued, "to permit a case to proceed to the stage of court appearance before the prosecution has been approved by the party who will bear ultimate responsibility for prosecutorial decisions".[252] It may be argued that, by analogy, before any case reaches the court appearance stage, Crown counsel should also be required to make a positive assertion that items seized are being detained for legitimate purposes. Indeed, some assertion as to the state of the investigation is required by the present subsection 446(1) of the *Criminal Code* within three months of seizure.

209. This does not mean, however, that the Crown ought to monitor all applications for a warrant to search. For one thing, such a requirement would complicate the process, and could be expected to make applications for warrants impracticable in certain cases, thus encouraging the police to perform warrantless searches. It is worth noting that, following the Kirby Report recommendations, a

monitoring system involving the Crown was set up; in practice, the system was described by a Crown official as "closer to a dream than reality". But beyond the administrative and pragmatic difficulties involved, there is the circumstance that search with warrant is basically an investigative rather than a "prosecutorial" function: while the search may uncover information that makes a charge appropriate, it is in itself neither a prerequisite or a concomitant to a charge. The participation of the Crown in initiating the process, therefore, should not be regarded as mandatory in principle, under the Commission's articulated standards.

210. This is not to say that more administrative arrangements, under which Crown counsel would monitor difficult applications, might not be useful in practice. Moreover, it would be consistent with the Attorney General's broad role as administrator of criminal justice for his representative to appear at search warrant hearings, either to support or oppose an application for a warrant. The existing practice by which issuers of warrants in some jurisdictions alert Crown counsel to cases involving significant problems, such as constitutional conflicts, deserves to be formalized. To affirm the judiciality of the issuer, however, it must be made clear that any role Crown counsel plays in the application process is as a submitter, rather than an adviser, to the issuer. While more participation by the Crown or other legal counsel undoubtedly would improve the quality of applications, it must be emphasized again that the maintenance of a judicial standard can only be assured by the independence and diligence of the issuers themselves.

G. The Telephonic Warrant

RECOMMENDATION

19. A telephonic warrant procedure, similar to that set out in the American Federal Rules, should be instituted in Canada. It should be available only when grounds exist to obtain a warrant under Recommendation 11 but resort to conventional procedure is impracticable. Safeguards should be implemented to ensure that a record of the proceedings is subsequently made available to persons affected, and that the warrant used by the officer is identical to that authorized by the issuer.

211. The telephonic or oral search warrant has been adopted in a number of American procedural codes, including the Federal Rules. In addition, it was endorsed by the Australian Law Reform Commission, which called it the "natural application of a modern convenience" to situations of urgency or inaccessibility of a magistrate.[253] Such problems may arise in Canada, in urban as well as rural settings. An officer may be at a location where he discovers things or information relevant to an offence. To leave the location in order to present a warrant application to an issuer would involve the risk of losing these objects of seizure. Yet, as a general rule, the officer has no other legal way of seizing them, short of arresting an occupant and making the seizure incidental to arrest. In cases where grounds do not exist for the arrest, the sole legal alternative left to the officer is to obtain the assistance of other officers in guarding the premises while the warrant is obtained.

212. Such predicaments would often be avoided if a telephonic warrant system were instituted. As outlined in Federal Rule 41(c)(2), such a system works as follows:

> (A) General Rule — if the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.
>
> (B) Application — the person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.
>
> (C) Issuance — if the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

213. The telephone warrant procedure offers two advantages. First, because it eliminates such factors as travel time and the preparation of a written application before execution, it abbreviates

the application procedure. American cases indicate that an oral warrant may be obtained in as little as ten minutes.[254] Second, because it may be obtained from any location, it allows the officer to stay near the place where he has discovered relevant objects. Both of these factors contribute to the practicability of the warrant in cases in which the use of conventional techniques would risk the loss of the objects, and accordingly they encourage resort to warrant procedures. To what extent, though, do the innovations inherent in the new procedure sacrifice the protective character of the warrant?

214. As far as the "particularity" of the warrant is concerned, there is no real difference in standards at all. Rule 41(c)(2)(E) requires that the contents of a warrant upon oral testimony be the same as a conventional warrant. Although the issuer is not presented with a written application containing specifics as to offence, items and location, this does not mean that specifics need not be given. On the contrary, the officer must recite them to the issuer for the purpose of their inclusion on the issuer's copy of the warrant. Since Canadian law has interchanged the standards of particularity applicable to informations and warrants, the dictation of one set of specifics rather than the written presentation of two does not effect a lowering of standards. The provision that ensures the uniformity of the recited description with that appearing on the actual warrant is the issuer's retention of the original warrant document.

215. Some problems are posed, however, with respect to "judiciality". Although the "reasonable grounds" test remains the same, the circumstances of its application change somewhat. First, there is the fact that no written application is presented to the issuer to assist him in making his decision. There are, no doubt, cases of such complexity that the absence of organized, written grounds of belief would hinder the evaluation process. However, the applicant would be likely to experience confusion in his oral presentation of such cases, and since it is the applicant who must demonstrate the grounds of his belief to the issuer, the basic rules of issuance would dictate that the application be refused. Moreover, since complex cases of this type would likely have been pieced together after a long and careful investigation, it seems doubtful that the "urgency" factor necessary to justify dispensing with the written application would obtain in such instances.

216. In the majority of cases, on the other hand, the main advantage of the written application lies not in the assistance the issuer gains from the document, but rather in its availability as a record of the proceedings. Thus, if an alternative record is available,

the prejudice stemming from the lack of a written application is diminished. The most obvious alternative is a transcript of the proceedings. Given that a telephonic warrant application is both exceptional and generally brief, it would not seem unreasonable to require the issuer's office to prepare a transcript without delay. Once it was prepared, it would be filed, like a written application, with the warrant. The availability of a stenographer and recording device can be ensured through organization and centralization of procedures, such as the establishment of an on-duty issuer with the necessary equipment and personnel.[255]

217. Second, the point may be made that the long-distance presentation of the application precludes the observation of the applicant's demeanour by the issuer. This point is undoubtedly true, but one wonders whether it is very significant. So long as the procedure is primarily documentary, demeanour is only relevant when the applicant is swearing the oath, and in the course of answering any questions the issuer may put to him. And, as an American commentator has pointed out,[256] the police officer's familiarity with legal proceedings makes demeanour a less-than-reliable indicator of credibility in any warrant application. Any cases in which demeanour might arouse suspicion might well be discernible through either the quality of vocal presentation or the consistency of the applicant's allegations. Ultimately, the significance of this factor appears to be minimal.

218. A properly safeguarded telephonic warrant procedure can be virtually as judicial as the normal documentary one. Indeed, models for conducting oral applications, such as that used in San Diego, California[257] not only compensate for the procedure's lack of documentation, but stand as examples of informative, meaningful inquiries into the basis for warrant issuance. Various Canadian jurisdictions, particularly in northern areas, have begun to use the telephone for proceedings such as bail applications and *ex parte* civil motions. We therefore recommend that the telephonic search warrant be incorporated into Canadian law. Since it is the impracticability of resort to conventional warrants that justifies its use, however, the telephonic warrant should be available only where the applicant can demonstrate this impracticability to the issuer.

219. Finally, it is important to recognize that just as the invention of the telephone expanded the possible ways of communicating authority, so too, the emergence of new technology may make the proposed telephonic procedure obsolete. For example, the widespread development of facilities for transmission of a copy of

a warrant signed by an issuer to a terminal in an officer's patrol car could eliminate the necessity of the officer hand-copying the issuer's instructions. As new technology becomes widely available, the law must be flexible enough to address it.

II. Execution of Warrants

A. Peace Officers and Private Individuals

RECOMMENDATION

20. Private individuals should continue to be entitled to apply for search warrants. Once the issuer has decided to authorize a search, however, the responsibilities of execution should lie entirely with peace officers. Peace officers should be empowered to bring into the place or vehicle to be searched any private individual whose presence is reasonably believed to be necessary to the successful execution of the warrant.

220. Except for warrants issued under the precious metals provision and section 443, all current search warrants must be executed by peace officers. In fact, the existing powers to execute a warrant privately are largely theoretical. The former provision appears to be rarely used, and the cross-country survey revealed no instances of private execution in the case of the latter. The question arises, then, as to whether or not the possibility of private execution ought to be left open by legislation.

221. The provision for private execution, at least in section 443, appears to be a product of historical distortion of Hale's common law warrant. Hale himself recognized the desirability of reducing the aggrieved party to the status of an adviser to the executing constable.[258] Later commentators, however, observed that warrants were in fact issued to private persons as well as constables.[259] Today, when the interest justifying the search is less the vindication of private rights than the enforcement of the criminal law, the provision for private execution is simply anachronistic. While certain intrusive powers are still accorded to individuals in the case of arrest, these

essentially arise in situations of urgency or sudden discovery of an offence, and are qualified by the stipulation that the individual deliver the accused to a peace officer.[260] There is no power under the *Criminal Code* to issue an arrest warrant to a private person, and it is difficult to maintain that such a power ought to exist in the case of search and seizure.

222. This is not to say, however, that a private individual ought to be precluded from swearing an information to initiate a search with warrant. The private individual's right to initiate proceedings is built into the spectrum of criminal procedures. In the early case of *Hetu* v. *Dixville Butter and Cheese Association*, Fitzpatrick C.J., speaking for the Supreme Court of Canada, affirmed the right of an individual to commence a prosecution: "To lay an information when in possession of facts sufficient to establish a *bona fide* belief of guilt, is not a fault, but the exercise of an undoubted right".[261] Recognizing the importance of this right, this Commission in its Working Paper on *Control of the Process* recommended that private individuals retain the right to lay charges.[262]

223. However, once the justification for the exercise of a coercive power has been ascertained, the responsibility for its exercise must belong, as much as possible, to the agents of the State. In a sense, this position derives from the basic exchange at the heart of the ideology of the liberal democratic State — the individual's concession to the Sovereign of his coercive powers in exchange for the security the Sovereign can offer.[263] The position is also supported by the common law concern that the party executing the warrant be free from any material interest in the outcome of the search.[264]

224. That a private individual should not be given the responsibility for executing a search warrant does not mean that he also be excluded from assisting in the search if the peace officer deems it necessary. It is evident that in some cases the presence of a private complainant or other individual might both facilitate the search and minimize the intrusion suffered as a result. For example, in searches and seizures involving business documents, the presence of an accountant may assist in isolating documents relevant to alleged transactions. Some police forces purport to authorize his participation by obtaining warrants directed to the accountant as well as to the peace officers. However, the alternative nature of the wording in subsection 443(1), which allows for a warrant to be given to a "person named therein *or* a peace officer", may not strictly permit this. Since an insufficient authorization could result in an individual being lawfully excluded from private premises or even found liable as a

trespasser, it is apparent that this situation should be clarified. Our recommendation would both provide for express authorization of a private individual accompanying the police and make that authorization clear to the individual affected by including it on the warrant.

B. Which Peace Officer May Execute the Warrant?

RECOMMENDATION

21. It should be legally permissible for any peace officer within the territorial jurisdiction of the issuer to execute a search warrant.

225. Assuming that peace officers are authorized to execute a search warrant, the issue remains: Which peace officers? This question reflects a discrepancy among the various warrant provisions. Section 443, which allows the justice to authorize "a peace officer" to conduct the search, has been interpreted as allowing a warrant to be issued to all peace officers in any given province.[265] The case-law has also suggested that a section 181 warrant could validly include such a wide direction.[266] On the other hand, warrants under the *Narcotic Control Act* and *Food and Drugs Act* provisions must be executed by "a peace officer named therein"; accordingly, in the *Goodbaum* case, it was held that the general direction permitted under section 443 invalidated a narcotics warrant.[267]

226. This problem was at the root of the finding of defects in narcotics and drugs warrants among the 98 evaluated by the judicial panel. Although the naming of a peace officer as executor of the warrant might seem a relatively minor inconvenience, it is worth asking what legitimate interest is served by restricting execution in this way. Certainly the naming of the executor does not lessen the intrusion as far as the individual is concerned. It does not purport to represent any evaluation of the fitness of the named party to execute the warrant. Rather, the warrant is issued on at least the tacit understanding that the recipient, whoever he is, will obey the rules attending execution.

227. On the other hand, there are strong arguments for abolishing legal restrictions as to which peace officers may execute a warrant. The authorization of particular officers is basically a throwback to an archaic notion of a one-to-one communication of

authority which derived from the subordinate relationship of the constable to the justice. Today, with a sophisticated police organization in place, this relationship no longer exists in any meaningful sense. Rather, lines of command and delegation are established within the police forces themselves. The issuer should direct his attention to the applicant, ensuring that he is in sufficient command of the basis of the investigation to present the requisite grounds to justify issuing the warrant. In the absence of a lingering police administrative role for the issuer, however, he has no business participating in decisions as to who should execute the warrant he has issued.

228. The one practical limitation upon the designation of executors of the warrant is the jurisdiction of the issuer. This is recognized in virtually all of the crime-related warrant provisions. Subsection 443(1), for example, speaks of premises within the justice's "territorial division", while subsections 101(9), 181(1) and 182(1) refer to the issuer's "jurisdiction". The question of jurisdiction is beyond the scope of this paper, and the existing structure of territorial divisions is therefore accepted for the present purposes. The scope of the paper also entails acceptance of the "backing" procedure currently available under subsection 443(2) of the *Criminal Code* for the execution of the warrant in another territorial division.

C. Daytime or Night-time Execution

RECOMMENDATION

22. Warrants should authorize execution by day only, unless the applicant shows reasonable cause for allowing execution by night.

229. In the common law of the seventeenth century, searches of premises with warrant could only be performed in the daytime; nocturnal intrusions were prohibited both for their "great disturbance" and the fear of robberies being committed under the guise of authority.[268] Modern techniques of lighting have obviously diminished the latter concern, but the former is still vital. Most individuals sleep at night, and intrusions during sleeping hours, practically speaking, represent particularly acute disruptions of normal life. Still, the only crime-related warrant to retain even vestiges of the

common law position is that under section 443, which is governed by section 444:

> A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

Sections 181 and 182 of the *Criminal Code* allow execution "by day or night", whereas entry under the *Narcotic Control Act* and *Food and Drugs Act* warrants may be effected "at any time". Sections 100, 160, 281.3 and 353 do not mention the time factor at all.

230. Our empirical evidence indicates that most warrants issued permit execution at the officer's discretion. However, in some cities covered by our survey — Edmonton and Winnipeg in particular — a practice of imposing time constraints had developed among local justices and Provincial Court judges. Indeed the actual imposition of time constraints appears to be a function more of local practice than of the particular statutory regime invoked. Our results also indicate that time constraints, when imposed, are almost invariably obeyed. Out of the cases reported in which time constraints were imposed and compliance could be ascertained, the vast majority were executed during the prescribed hours.[269]

231. What ought to be the general rule? None of the common law jurisdictions surveyed retains the hard and fast prohibition against nocturnal search. Indeed, the nearest approximation to Hale's position is that of the *French Code of Criminal Procedure*, which generally prohibits searches between nine o'clock at night and six in the morning unless a demand is made from within the premises.[270] On the other extreme, the Australian position has been quite permissive. Under the existing *Crimes Act*, the warrant may authorize a constable to enter premises at any time.[271] Recently proposed reforms give the magistrate discretion to restrict the time of execution without establishing any onus or presumption as to the appropriate hours.[272] In between these two positions is that of American Federal Rule 41(c)(1):

> The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall delegate a federal magistrate to whom it shall be returned.

232. We find that the American position is the soundest of the three approaches. It recognizes that an unyielding restriction of searches to the daytime hours might render the search ineffectual in particular cases; at the same time it requires the applicant to

demonstrate the need for nocturnal execution before it permits him to exercise this more intrusive power. In essence "probable cause" amounts to proof that "the warrant cannot be executed in the daytime or that the property sought to be seized will be removed or destroyed".[273] A test similar to the American position should be articulated in Canadian legislation.

D. Deadline for Execution

RECOMMENDATION

23. A warrant should expire after eight days, but an applicant should be entitled to apply for a new warrant if grounds for search still exist after this period.

233. There is at present no statutory requirement that searches with warrant be performed within a specified period of time. In the *Execu-Clean Ltd.* case, the Ontario High Court of Justice was sympathetic to the view that if an issuer includes a specified date on the face of a warrant, the officer is bound by it,[274] although the actual authority under which an issuer is empowered to impose such a limitation remains unclear. Despite this lack of direction, however, there is a tendency among some issuers of search warrants to specify deadlines; altogether, 18.2% of the warrants executed were limited by an expiry date.[275] Once again, local practice seems primarily relevant. Issuers in Edmonton and Toronto imposed expiry dates relatively frequently compared to their counterparts in Winnipeg, Vancouver and Montréal. Moreover, the data indicated that those warrants with expiry dates were executed more quickly than those without such deadlines.

234. The existence of an expiry date is a healthy element in a search warrant regime, for reasons that relate to both the "judiciality" and "particularity" of the warrant. In the *Adams* case, the English Court of Appeal held that a search warrant for obscene publications authorized only one search, entry and seizure: a conclusion necessary to a truly "particular" warrant procedure.[276] If police maintain the discretion to make the single intrusion after a lengthy period of time, however, the possibility remains that the police will undertake their intrusion in circumstances different from those that prompted the issuer to grant the warrant. Yet it is the intrusion itself

that must be justified by the circumstances, not simply the conferment of authority to intrude. This entails a proximity in time between the issuance and execution of the warrant. It is thus unsatisfactory to allow execution of the warrant 103 days after its issuance, as occurred in one case surveyed by the Commission.[277]

235. Deadlines upon search have been imposed in a number of different jurisdictions. While no deadlines exist in Canadian federal search warrant provisions, a number of provincial statutes, notably those dealing with liquor control, do specify time limits on execution.[278] The specific length of time picked, however, has varied considerably. Both the British Royal Commission on Criminal Procedure and the Australian Law Reform Commission's proposed legislation allow seven days,[279] and we accept that this period is a sensible one.[280] In order to accommodate the increasing number of police forces using a "four on — three off" shift system, however, we would fix the time limit at eight days. In consultations with Commission researchers, police authorities indicated that they could operate within such a deadline. If, after the expiry of the period, the police believe that circumstances still justify the authorization of a search, it is not unreasonable to ask them to submit those circumstances to an adjudicator for a new determination and obtain a new warrant.

E. Scope of Search and Seizure with Warrant

RECOMMENDATION

24. A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to "objects of seizure" specified in the warrant, other "objects of seizure" he finds in plain view.

236. We have specified that the following are legitimate "objects of seizure": takings of an offence; evidence of an offence; and things,

funds and information possessed in circumstances constituting an offence. The warrant issued in a particular case should thus contain descriptions of items within one or more of these categories. The officer, however, in the course of making the authorized search, may discover other things, funds or information falling within the definition of seizable objects, yet not mentioned on the warrant. Should he be allowed to seize them?

237. The answer with respect to the section 443 warrant in present legislation is a qualified yes. Section 445 of the *Criminal Code* clearly allows for seizure of things, not included in the warrant, believed on reasonable grounds to have been "obtained by or used in the commission of an offence". Although this provision may not actually authorize the seizure of items of a purely evidentiary nature, it does give the peace officer considerable scope. Accordingly, officers are instructed in police training materials not to confine their attention to articles specified on the warrant. "Be alert", reads the Metropolitan Toronto Training Précis, "for anything unlawful".[281]

238. According to the Commission's survey results, the power to seize unspecified objects is used often but not in the majority of cases. If one breaks down the figures according to things seized, 66.3% of the seizures reported were of the things or types of things described on the warrant.[282] The remaining 33.7% of seizures represented objects that the issuer of the warrant did not, on the evidence before him, order seized. What policy, then, justifies such departures from the authority of the warrant?

239. It is plain that if the officer's grounds for seizing the additional goods are indeed reasonable, he could obtain a warrant for them. What he is being allowed to do in skipping this procedure is essentially to perform a warrantless seizure. In fact, case-law on point has supported such seizures on a ground recognized in this Working Paper as justifying an exception to the warrant requirement: that obtaining a warrant would be impracticable. As put somewhat bluntly by Lord Denning in *Chic Fashions (West Wales) Ltd.* v. *Jones*:

> Suppose the constable does not find the goods mentioned in the warrant but finds other goods which he reasonably believes to be stolen. Is he to quit the premises and go back to the magistrate and ask for another search warrant to cover these other goods? If he went away, I should imagine that in nine cases out of ten, by the time he came back with a warrant, these other goods would have disappeared. The true owner would not recover them. The evidence of the crime would have been lost. That would be to favour thieves and to discourage honest men.[283]

240. This puts the case somewhat extremely. Even under a conventional warrant system, the peace officer could, for example, have a fellow policeman remain on the premises while he obtained authorization from a justice. Under a telephonic warrant system, the peace officer often could obtain the warrant while remaining on the premises. On the other hand, there are undoubtedly cases in which obtaining a telephonic warrant is not a real alternative — there might not be a telephone on the premises, there might be a risk of injury to the officer or destruction of the objects sought even with the officer's continuing presence on the premises. Ultimately, the question becomes one of whether the costs entailed by compelling a second application for a warrant are outweighed by the dangers created by permitting the seizure of unspecified items.

241. The prospect of allowing seizure of unspecified items creates two significant dangers. The first is the possibility that objects will be seized on the basis of mere speculation or arbitrary exercises of discretion, rather than on reasonable grounds for believing that they are legally seizable. Arbitrariness is, of course, the spectre that the notion of prior control inherent in the warrant is supposed to curtail. The existence of a warrant to search the premises, however, means that insofar as the entry and search are concerned, that control has been exercised. We believe that control of the unspecified seizure would be adequately served by requiring the officer to file a report after the seizure, setting out its particulars and the reasons why it was made. Such a procedure is set out in Recommendation 37 and detailed later in this Chapter.[284] Although it cannot prevent unjustified seizures, the report can both discourage them by letting the peace officer know that he will be accountable for his actions, and give an individual an informed basis, analogous to the written warrant application, upon which he may challenge them. The inconvenience of such a report is hardly prohibitive; it merely adds one element to the return which the officer makes to the issuer.

242. The second danger is that the permission to seize unspecified objects will, in the words of Stewart J. of the United States Supreme Court, "invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home", and, once inside, to make "unconfined searches" for seizable objects.[285] Accordingly, American jurisprudence has developed the "plain view" doctrine which prevents an officer from fishing through the entirety of an individual's premises, looking for something to seize. We conclude that the "plain view" rule should limit seizures of objects not specified on a warrant. Since this rule is applicable to situations outside the

execution of warrants, it is also detailed later in this Chapter.[286] For the present, in Recommendation 24, we advance a modest proposal which aims to keep the execution of the search limited by its justification.

III. Execution of All Searches

243. The following rules cover problems arising in both warranted and warrantless searches. Although the specific instances of these problems may differ from typical cases of search with warrant to typical cases of search without warrant, we believe that the principles governing the resolution of these cases should be uniform.

A. The Use of Force

RECOMMENDATION

25. The use of force should continue to be governed generally by the standards presently set out in subsection 25(1) of the *Criminal Code*, which recognize that a peace officer, if he acts on reasonable and probable grounds, is justified in using as much force as is necessary.

244. The use of force is one of the considerations the warrant itself cannot address. It is both too circumstantial — what the officer should be authorized to do depends on factors that may vary from moment to moment, and too general — it is significant in the whole context of law enforcement, not just that of search and seizure. It may also be an area in which the application of legal rules, rather than the rules themselves, is primarily in issue.[287]

245. The present general rule regarding the use of force is set out in subsection 25(1) of the *Criminal Code*:

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> ...
>
> (*b*) as a peace officer or public officer,

...

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

This subsection applies to searches of persons as well as to searches of places and vehicles; the former topic is discussed later in this Chapter.[288] The application of force to persons may also arise in the context of a search of a place, however; for example, an occupant may attempt to prevent a peace officer from performing a search of his residence. Since the standard for resolving problems of force to persons is consistent whether the relevant search is directed against a person or a place, the whole area will be canvassed now.

246. In one particular type of search the use of force is not always resolved by reference to section 25. Special powers to break possessions are provided in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, which read:

> For the purpose of exercising his authority under this section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

No compelling case can be made for such sweeping discretion as a general rule. Whether special treatment under *Narcotic Control Act* and *Food and Drugs Act* provisions is justifiable will be discussed in Chapter Nine.[289]

247. The leading Canadian case on the use of force during a search is *Levitz* v. *Ryan*, which dealt specifically with search under a writ of assistance. However, Arnup J.A.'s discussion on this point was expansive, embracing American jurisprudence on search warrants. In conclusion he held that a "reasonable surveillance" of persons on the premises could be a necessary part of a search, depending on the circumstances of the case.[290] In *Levitz* itself, it was found that the officer grabbed the plaintiff as he was attempting to run from the premises, and swung him backwards, causing him to fall. The use of force was held to be reasonable by the Court.

248. The test in subsection 25(1) governs not only the degree of force used but the resort to force in the first place. In the Ontario Police College training materials, it is recognized that "police should only resort to physical force when persuasion, advice and warning fail to achieve the objectives".[291] Arguably, some degree of force is always present in searches of an individual's body, and perhaps particularly so in the case of narcotics and drugs searches. Among the

locations on the person mentioned in instructional materials dealing with such searches are artificial limbs, buttocks, foreskin of penis, nose, rectum, vagina, and under false teeth, bandaids and bandages.[292] The probing of such locations is likely to be somewhat painful as well as particularly intrusive. Accordingly, we propose that these activities be governed by special rules,[293] as set out in Recommendations 32 and 33.

249. For the most part, however, the best standards would appear to be those currently enunciated in section 25 of the *Criminal Code*. Even the *ALI Code*, as detailed as it is, provides only for application of the "reasonable" and "necessary" standards to searches, along with provisions similar to those currently set out in subsection 25(3) on deadly force. While it might be argued that more specific applications of these tests should be set out in legislation, any attempt to be exhaustive would be futile. The variations in circumstances that confront a police officer in his decision to use force defy codification. The better approach would appear to be to continue to set out the general standard in the legislation, and leave the guidelines to police instruction, administrative mechanisms and judicial resolution of specific, litigated cases.

B. Unannounced Entry

RECOMMENDATION

26. In the absence of circumstances justifying either unannounced or forceful entry into private premises, a peace officer should be required to make a demand to enter in all cases. If an occupant does not comply with the demand within a reasonable time, the officer should be empowered to use force to gain entry.

250. A special set of rules has developed with respect to unannounced and forcible entries into premises. This body of law dates back to the seventeenth century decision in *Semayne's Case*:

> In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.[294]

Notably, the rule focuses upon the home as opposed to other premises. This distinction was carried into Canadian case-law in *Wah Kie* v. *Cuddy (No. 2)*.[295] While maintaining the general rule that there must be a demand to open in searches of dwelling houses, the case denied that the rule applied when the premises were not residential. In the latter event, the officer was bound only by the "reasonable and necessary" test. This test is essentially incorporated into the special entry provision in subsection 182(2) which is applicable to warrants for evidence of gaming- and bawdy-house offences, and women in bawdy-houses.

251. This is one area in which the distinction between dwelling houses and other premises might be usefully de-emphasized in favour of circumstantial factors. Some such factors were described by Dickson J. in *Eccles* v. *Bourque, Simmonds and Wise*, a case which dealt with entry to effect arrest. The list included the need to save a person from death or injury, the need to preserve evidence from destruction, and hot pursuit of an offender.[296] Other enumerations are provided in American jurisprudence dealing with the "no knock" rule, and include the expectation of violence, escape or destruction of evidence, the existence of an open door, and the obviousness of illegal activities.[297] We conclude that, whatever the use of private premises, in the absence of circumstances justifying either unannounced or forceful entry, an officer ought to be required to make a demand to enter. If an occupant does not comply with the demand, the officer ought to be empowered to enter the premises, resorting to reasonable force if necessary. American case-law has established that after notice is given, an officer must wait a "reasonable time" before breaking in; a wait of thirty seconds has been held to satisfy this standard.[298] This reasonableness test should be recognized in Canadian law.

C. Duties toward Individuals Affected by the Search or Seizure

RECOMMENDATIONS

27. Where a peace officer makes a search or seizure with a warrant, he should be required, before commencing the search or as soon as practicable thereafter, to give a copy of the warrant to the person to be searched, or to a person present and ostensibly in control

of the place or vehicle to be searched. A copy of the warrant should be suitably affixed within any place or vehicle that is unoccupied at the time of the search or seizure.

28. Where practicable, a person present and ostensibly in control of a place or vehicle should be entitled to observe the search.

29. If objects are seized in the course of a search, the individual affected should be entitled to receive an inventory of these objects on request. If the owner of the objects seized is known to be a different person from the individual whose place, person or vehicle is searched, he should be provided with an inventory without the necessity of a request. The extent of detail on the inventory should be that which is reasonable in the circumstances.

(1) *Production of the Warrant*

252. At present, the peace officer executing a warrant is under a minimal duty to provide information to an occupant about the intrusion upon his premises. All he must do is show the person concerned the warrant when required by subsection 29(1) of the *Criminal Code*:

> It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

While subsection 29(1) goes some distance toward assuring persons against whom a warrant is executed that the search is authorized, it stops rather short in two respects. First, the requirement that the warrant be produced is conditional upon the feasibility of the executor having the process with him, and even then only upon request. Second, subsection 29(1) does not require that the warrant be produced at the commencement of the search, which is presumably when an assurance of legality would be most worthwhile. Nor, incidentally, has Canadian case-law developed any requirement that the warrant be produced at the outset of a search or as soon as practicable thereafter.[299]

253. In discussion with Commission researchers, a number of forces mentioned different practices of showing a search warrant to an occupant in the course of a search. Some peace officers stated that they would tell a person that they had a warrant as a matter of course, but would not show the warrant unless requested to do so. Some

commented that the decision to show the warrant might depend on the identity or characteristics of the occupant of the premises. Others claimed that as a matter of policy a person would always get a copy of a search warrant to examine, but not necessarily to keep.

254. In contrast, the *ALI Code* recognizes the principle that the warrant should be shown as soon as possible, regardless of whether a request has been made or not:

> In the course of any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be. The copy shall be read and furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case it shall be read and furnished as soon as is practicable. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.[300]

Although inconveniencing the peace officer in a minor way, this rule ultimately benefits both the officer and the individual concerned, by making the officer's authority visible as soon as possible.

(2) *Giving Reasons for the Search*

255. The requirement that peace officers conducting searches with warrant be required to show the warrant document provides considerable information to the individual concerned. While most warrants will not disclose the grounds of belief presented in the application before the issuer,[301] they are required to specify the premises to be searched, objects to be seized and an offence to which the search relates. Since these protections are supplemented by certain rights of access to the information after execution of the search,[302] we find little need to augment them.

256. We were concerned, however, that no such information was available to persons subjected to a search without warrant. This concern was reinforced by reference to two sections of the *Canadian Charter of Rights and Freedoms*. The first of these is section 8 which affords security against "unreasonable search or seizure". To require that reasons be given when persons are searched without warrant would give some force and visibility to this constitutional rule. In a similar vein, the Royal Commission on Criminal Procedure

concluded that a notification of reasons for the exercise of stop and search powers would assist in enforcing the threshold criterion of "reasonable suspicion".[303] As well, the provision of reasons could assist in ensuring that peace officers could be held accountable if the search or seizure were subsequently challenged. Along with this enforcing effect, the requirement that reasons be provided could contribute to better relations between the police and the persons they search without warrant in the course of their duties. To paraphrase a somewhat worn expression, it could help to ensure that reasonable searches are not only done but seen to be done.

257. Second, requiring that reasons be provided to persons searched without warrant would be consistent with the spirit of subsection 10(1) of the *Charter*, which reads:

> Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and
>
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Although this is a constitutional rule pertaining to arrest, it may be relevant to search and seizure insofar as the exercise of these powers may involve incidental detention of individuals. Such detentions could arise in the context of non-consensual stops of vehicles and persons authorized in Recommendation 9, and even the kind of "freezing" of the premises accepted in *Levitz* v. *Ryan*.[304] In other words, it is possible that an arrest or detention may be found to have occurred notwithstanding the fact that the peace officer involved in the incident was executing a power other than arrest (or even no recognized power at all). On the other hand, a differentiation between powers of search and seizure and those of arrest may be relevant for Canadian constitutional purposes, the former being assigned section 8 protections, the latter the coverage of section 10.[305]

258. Even if section 10 of the *Charter* is found to be inapplicable to situations occurring in the exercise of search powers, the requirement of providing reasons at the time of search would serve the useful purpose of eliminating a source of potential hairsplitting. It has been argued that from a phenomenological point of view, the similarities between personal search and arrest activities are strong. To split the protection accorded to the individual on the basis of the identity of the power employed is to risk subsequent wrangling over the question of that identity. In the *Scott* case, a

Canadian appellate court found itself unable to agree with the trial court as to whether a brief encounter between peace officers and a patron of a bar had involved an arrest or merely a search.[306] Such conflicts could be minimized if procedural protections between the two exercises were parallel.

259. Notwithstanding the force of these arguments, however, we have declined to follow the example of the Royal Commission on Criminal Procedure, which recommended that reasons be provided to persons who are searched without warrant and that those reasons be recorded in the officer's notebook.[307]

260. Our reasons for declining to make such a recommendation are several. First, though perhaps the least compelling, is the "paper burden" consideration. If we were to make such a recommendation, any given consent search could entail the police officer being obliged to complete three separate forms: a statement of his reasons for the search or seizure, which reasons would presumably be recorded in his notebook; a consent form, signed by the person searched; and an inventory of things seized. Of these three items, the written statement of reasons would seem to be the most expendable. This is perhaps more obviously so when it is appreciated that, even in the case of a search with warrant, the warrant document will not generally disclose the reasons for the search. Second, the British Royal Commission's recommendation was specifically referable to the exercise of "stop and frisk" powers. By contrast, our recommendations, as a whole, are designed to express a preference for search with warrant and to limit resort to powers of search without warrant to circumstances of recognized exigency and informed consent. The exigencies we recognize number only two: danger to human life or safety and arrest. In the case of a consent search, the officer will likely find himself obliged to provide reasons before consent is forthcoming. In the case of search incidental to arrest, section 10 of the *Charter* requires that persons be informed promptly of the reasons for their arrest or detention. Requiring additional reasons — in writing — for the search that follows the arrest seems manifestly superfluous. As for the "danger to human life or safety" exception to the warrant requirement, it does not seem unreasonable to expect that in those cases where the reasons are not already self-evident, they will, in the nature of things, likely be forthcoming at, or immediately after, the event.

(3) *Witnesses and Inventories*

261. Beyond the production of the warrant upon request, there is nothing the law currently requires the officer to do in the course of his search. He is bound only by the standard of reasonableness. While this may serve as an adequate restraining principle, it does not take account of positive steps that the interests of the individual affected arguably demand. Specifically, the individual himself should be entitled in most cases to observe the search and upon request to receive an inventory of items seized.

262. The thrust of these demands is to make the execution of the search as much of a visible, civil and respectful exercise as possible, and to bolster the professionalism of the police. While the roles of the searcher and occupant are naturally adverse, this does not mean that the search need always be conducted in an overtly hostile manner. Rather, the peace officer should recognize the intrusiveness of his actions and attempt to be as considerate of the occupant as is realistic. While requirements of police courtesy are evident in both police instructional materials in Canada and the *ALI Code* in the United States, a quite remarkable exposition of such policies may be found in the *French Code of Criminal Procedure*. This Code includes different sets of rules for searches of domiciles belonging to accused and unaccused parties. Both sets of rules require the search to be made in the presence of the occupant, or a surrogate; if the occupant is not an accused party, he "shall be invited to assist" in the search. At the conclusion of the search, an official report is prepared and the witnesses to the search requested to sign it.[308] While the differences between civil and common law jurisdictions must be taken into account, the tone of the French legislation commends itself.

263. The general rule that an occupant of a place or a vehicle searched be entitled to witness the police activity is not only an instance of civility but of common sense: the presence of a witness verifies the officer's account of the conduct of the search. This policy has already been implemented to some degree, by police guidelines which require the officer in charge to have the landlord or occupant of the premises accompany him while the search is in progress.[309] We are mindful of the privacy problems entailed in allowing persons such as neighbours or bystanders to witness searches in the individual's absence. However, with respect to the occupants themselves, the law ought to sanction existing guidelines by incorporating them into legislation, making provision for exigencies in which the individual's

presence would be counter-productive (e.g., where he is so hostile as to make his presence a danger to the successful conduct of the search). We attempt to compensate somewhat for the absence of a witness in searches of unoccupied places or vehicles by the requirement that the police executing the search leave a copy of the warrant suitably affixed within the premises.

264. The inventory requirement was recognized at common law as applicable to seizures of stolen goods,[310] but it is not present in any modern provision. Inventory procedures, however, have been adopted by a number of Canadian forces. Members of one force told Commission researchers that they send exhibit forms to the individual from whom items have been seized as well as to their own records departments. On the other hand, another force looked unfavourably on inventory procedures as an unnecessary source of paperwork, backing up their argument by reference to an absence of complaints from persons affected. In between these views stood a number of forces which maintained that they would provide an inventory upon request.

265. A statutory requirement that a person whose possessions are seized be provided with an inventory is part of the American Federal Rules[311] and has been recommended by the Royal Commission on Criminal Procedure.[312] We believe that the principle should be adopted in Canada as well, but with a proviso. There may be cases in which the individual does not require and perhaps does not want an inventory. Examples of the latter possibility would be cases in which the objects seized were illegal to possess. Accordingly, we propose that the requirement stem from the individual's request. Since the officer will usually make an inventory for administrative purposes anyway, and indeed should do so for the purpose of making a return upon a warrant before the justice, the requirement imposes little extra burden upon the police. The objective of informing the occupant as to the exact possessions being taken from him enhances the visibility of the search and seizure procedure, and is well worth any inconvenience involved. In cases in which the volume of material seized makes a meticulous list impracticable, the inventory should be as detailed as is reasonable under the circumstances.

266. One possible complication involved in an inventory requirement concerns the potential use of an individual's receipt of an inventory as evidence against him in court. Where possession of the objects seized becomes a fact in issue at trial, any express or implied acknowledgment by an individual that an inventory was accurate

could be considered relevant evidence. In order to protect himself against this contingency, the individual from whom things are seized may wish to decline to request or to receive any such inventory.

D. The "Plain View" Doctrine

RECOMMENDATION

30. If a peace officer, in the course of a lawful search or otherwise lawfully situated, discovers "objects of seizure" in plain view, he should be empowered to seize them without a warrant. In such cases, a post-search report should be filed, as specified in Recommendation 37.

267. There are a number of ways in which a peace officer executing a lawful search may discover objects of seizure not covered by the justification underlying his initial intrusion. For example, a peace officer searching premises with a warrant for stolen goods may find a supply of illegal drugs; a peace officer arresting an individual in his house may see an illegal weapon beyond the reach of the accused and hence outside the ambit of the "reach" test proposed in Recommendation 7.[313] This situation poses a certain dilemma. Notwithstanding the obvious criminal law enforcement interest in taking the opportunity to acquire such objects, there is a risk that permitting their seizure invites peace officers to expand specifically authorized searches into "fishing expeditions". Some special provisions, such as subsection 10(1) of the *Narcotic Control Act*, permit seizure of objects not mentioned on the warrant but still connected to the same or a related offence. But what if the incriminating items pertain to another kind of offence altogether? Aside from the provisions of section 445 of the *Criminal Code*, which deals exclusively with searches with warrants issued under section 443,[314] Canadian law has not addressed this problem. However, the dilemma has been resolved in American case-law by the "plain view" doctrine.

268. This doctrine basically holds that taking advantage of the observation of incriminating objects in "plain view" does not involve the peace officer in any distinct "search" activity outside of that covered by his initial justification; hence, by allowing seizure of such objects, the law does not sanction any "general or exploratory" intrusion into the privacy of the individual concerned.[315] Rather, the

only recognizable deprivation resulting from the discovery is the individual's loss of the incriminating objects found. Warrantless seizure of these objects is permitted because the deprivation suffered does not outweigh the inconvenience or possible danger entailed in requiring the police to obtain a warrant specifically covering these objects.[316]

269. The American position is informed by Supreme Court case-law, which has confined the doctrine according to its rationale:

> It has been emphasized that any evidence seized by a law enforcement officer will ordinarily be in "plain view" at least at the moment of seizure, and that the mere fact that evidence is in "plain view" at the moment of seizure thus does not indicate that the "plain view" doctrine applies. The Supreme Court has held that the "plain view" doctrine is subject to such qualifications and exceptions as the following: (1) the observer of objects in "plain view" must have the right to be in the position to have that view; (2) in order for the seizure of objects observed in "plain view" to be constitutional, the seizure must be based either on a valid warrant or on "exigent circumstances" justifying the failure to obtain a valid warrant.[317]

We believe that the doctrine is a valuable one and accordingly recommend its incorporation into Canadian law.

270. It has been suggested in American jurisprudence that the "plain view" doctrine will not justify seizure of the object where its incriminating nature is not apparent from the "plain view" itself.[318] In some cases, distinctions have been drawn between seizure of contraband, stolen goods and dangerous articles, and objects of simply evidentiary value, although seizure of the latter category still appears to be constitutional if the discovery is inadvertent.[319] It would be possible to simplify the American approach somewhat by excluding from seizure objects which were neither "takings of an offence" nor "possessed in circumstances constituting an offence" but serve merely evidentiary purposes. Indeed such a policy may already be implicit in Canadian law. At present, the additional items seizable under section 445 of the *Criminal Code* are restricted to things believed to be "obtained by" or "used in the commission of an offence", a provision which may not cover mere evidence. However, there are unquestionably some kinds of evidence, such as bloodstained clothing or lawfully possessed weapons, which are incriminating at first glance, and we are not persuaded that excluding such objects from our Recommendation would serve any truly beneficial purpose. For this reason, and in the interests of simplicity, we propose that the "plain view" doctrine be applicable to all objects of seizure.

IV. Searches of Persons

RECOMMENDATIONS

31. A peace officer may search a person:

(a) named in a search warrant;

(b) found in a place or vehicle specified in a search warrant if:

(i) there is reasonable ground to believe that the person is carrying an object of seizure specified on the warrant; and

(ii) the issuer of the warrant has authorized the search of persons found in the place or vehicle on the face of the warrant; or

(c) pursuant to the powers of search without warrant set out in Recommendations 5-10.

However, no "medical examination" or mouth search may be conducted except as provided in Recommendations 32 and 33.

32. No activity involving the puncturing of human skin should be authorized under search and seizure law. A "medical examination" (*viz.* a sexually intimate search, examination of the naked body or probing of body cavities not involving puncturing the skin) should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) pursuant to a specific warrant naming the person to be examined;

(c) if performed by a qualified medical practitioner; and

(d) if conducted in circumstances respectful of the privacy of the person to be examined.

33. A search of the mouth of a person should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) if performed in a manner not dangerous to human life or safety;

(c) on the condition that the peace officer performing the search complete a post-search report, as set out in Recommendation 37.

A. Reasonable Grounds to Believe

271. It seems trite to say that the law protects each individual. It is not, for example, a collective protection against assault that extends to the residents of a building, but rather a protection of each resident individually. Consequently, it might be expected that protection against search would be accorded on such a basis, *viz.* that a person could not be searched unless a particular ground for searching *him* was present. The present law, however, is not always so individualized. Perhaps the most significant departure is evident in *Narcotic Control Act* and *Food and Drugs Act* provisions, which permit search of "any person" found in places searched for narcotics or drugs.[320] In the wake of the *Jaagusta* case, it appears clear that even in warrantless searches, reasonable ground for belief must exist as to the presence of drugs, either on the individual or in the place in which he is found, before a personal search can be made.[321] However, the alternative nature of this rule leaves it open for the officer to search anybody found inside a place, once he has the warrant or other authority under the statute to enter it.

272. This state of affairs was criticized in the Pringle Report,[322] which dealt with an incident of indiscriminate internal searches of the occupants of a tavern. The report referred to a June 1974 policy directive of the R.C.M.P. advocating the "utmost discretion" in the exercise of powers of personal search, and prohibiting strip searches "unless the investigator possesses reasonable and probable grounds to believe that the person is in physical possession of prohibited goods or evidence" of an offence. It went on to recommend that persons found in non-residential premises not be subject to search unless reasonable cause existed to believe that they were in possession of incriminating things.[323] We affirm this position. To entrust any measure of personal search to officers using "utmost discretion" is simply not good enough. Aside from principle, empirical evidence would suggest that this discretion is used quite liberally. In 487 searches of premises under *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 959 personal searches were conducted.[324]

273. Our recommendations recognize that the justification for intrusion should be related to the individual whom the peace officer wishes to search; the things, funds or information sought must be associated with him in a way sufficient to make the intrusion defensible. We apply this rule not only to searches of persons found

in the course of searching a place but to all instances in which a personal search is authorized, save for arrest. This position is based in part on constitutional considerations. In the *Ybarra* case, the United States Supreme Court found that each individual in a tavern was clothed with an individualized constitutional protection against unreasonable search and seizure, including frisks.[325] This rule was based on wording in the American Fourth Amendment similar to that found in section 8 of the *Canadian Charter of Rights and Freedoms*. Even aside from constitutional issues, however, the policy articulated in *Ybarra* is a sound one, and one which ought to be recognized in Canadian statute law.

274. We are aware of the possibility that powers to conduct searches of persons upon "reasonable ground to believe" could be distorted in practice into programmes of random or sweep searches. An account of such a programme with the alarming consequences that followed from it is found in the recent Scarman Report on the Brixton riots in England.[326] The danger of such programmes may be particularly acute in the instance of warrantless search powers such as those set out in Recommendations 7 to 10. We do not accept, however, that such programmes are deterred by ignoring the legitimate criminal law enforcement interest in conducting personal searches in certain circumstances, when reasonable grounds truly exist. As we indicated earlier, the effect of ignoring these interests may simply be to influence police to account for such searches by reference to relatively discretionary powers such as those found under provincial liquor legislation, to inappropriate constructions of consent or to problematical situations of arrest. Our approach, rather, has been to accord the police a proper range of powers of personal search, attended by procedural safeguards designed to limit the possibilities of their unjustified use.

275. It might also be wondered whether "reasonable grounds to believe" is a sufficiently strict probative test for personal search. Some American case-law on searches for narcotics has used "probable cause" as the applicable standard of proof,[327] although a lesser "reasonableness" test seems the guiding standard in frisks for weapons.[328] On the other hand the Royal Commission on Criminal Procedure has sanctioned a somewhat vague criterion of "reasonable suspicion".[329] Like the drafters of the Australian *Criminal Investigation Bill*, we conclude that the "reasonable ground" standard is appropriate for our purposes.[330] This decision reflects in part the traditional association of this test with Canadian search and seizure law as well as its fidelity to the "reasonableness" test in

section 8 of the *Canadian Charter of Rights and Freedoms*. It also accords with our observation that fine semantic differences may be of limited impact to peace officers faced with an immediate decision as to whether to search a suspect. Finally, it evinces our belief that true protection against unjustified personal searches can only come from the attitudes of the peace officers, the warrant issuers and the judges who are called upon to apply the law. Properly and fairly applied, the "reasonable ground to believe" test strikes a sound balance between the interests at stake in the situations of personal search covered in our recommendations.

B. Warrants to Search Persons

276. The idea of specific warrant to search persons may seem foreign to the mainstream of Canadian criminal procedure, despite the possible availability of such a warrant under sections 101 and 353 of the *Criminal Code*. However, the association of warranted searches with places and warrantless searches with persons is a result of the long historical growth of these search powers in separate strands rather than any legitimate distinction in principle.[331] Indeed, if one accepts the premise that warrants should be available to authorize all justifiable searches and seizures, it is the omission of personal searches from the warrant provisions that appears contrary to principle. This premise has now been incorporated into a sufficient number of codes and provisions[332] in other jurisdictions that the exclusive association of personal search with warrantless powers may be on its way to becoming an anachronism.

277. While it might be observed that many personal searches, including those incidental to arrest, are undertaken in urgent circumstances, this does not argue against the availability of a warrant to perform personal searches. Rather, it argues for the availability of the additional option to perform warrantless searches where circumstances require. It seems trite to observe that the fact that many arrests are carried out in similarly exigent circumstances has not made the peace officer's arrest powers exclusively warrantless. Although the considerations justifying warrantless search cannot be equated with those justifying warrantless arrest, it is

fair to observe that with both search and arrest powers, the choice is between different modes of authorizing an intrusion upon the person. If the warrant, with its inherent features of judiciality and particularity, is an appropriate mode of authorizing an individual's arrest, it is not evident why it is not an appropriate mode of authorizing a search of his person.

278. It might be argued that establishing a warrant to search persons is something of an academic exercise, in that police will invariably perceive that obtaining a warrant is impracticable, and proceed to perform a warrantless search.[333] But while the extent to which warrantless searches are indeed confined to "impracticable" cases is an important problem,[334] it is not resolved by the exclusion of personal searches from warrant provisions. What such exclusion means is that the peace officer cannot go to a judicial official for authorization even when he appreciates that it is practicable, and indeed desirable, for him to do so.

279. Moreover, there is one type of personal search in which a warrant is not only practicable but essential: the performance of "medical examinations". This topic is discussed in detail later; for the time being it is sufficient to state that the number of strip and internal searches currently performed indicates that a warrant requirement in this respect could be expected to produce a significant number of warrant applications.[335]

280. What tests, then, ought to be applied in authorizing personal searches under warrant? There are actually two specific issues relevant here. As to the probative test that ought to be applied by the issuer in authorizing the search of a person, there would appear to be no basis for departing from the "reasonable grounds" test. The critical requirement is that each individual to be searched be someone in relation to whom the requisite reasonable grounds for belief exist.[336] As to the particularity with which the person must be described, this would vary with the circumstances of each case, but there is obviously a need for a name, or at least a physical description accompanied by a precise location at which the person might be found.[337] Although American decisions are not entirely consistent on this point, it would seem that the elaboration of particularity tests is best left to the flexible context of case-law, rather than attempting to establish them in the legislation itself. Canadian cases, such as *Gibson*[338] and *Royal American Shows Inc.*,[339] have developed intelligent particularity rules with respect to the search of premises, and there is no reason to believe that similar tests could not be developed with respect to individuals to be searched.

C. Searches of Persons Incidental to Searches of Places and Vehicles

281. Personal searches currently carried out in the course of executing search warrants are rarely carried out in pursuit of warrants expressly authorizing personal search. Rather, they are usually undertaken in the course of executing searches of premises. As such, they are based on various sources of legal authority and, in some cases, no apparent source of legal authority at all.[340] In deciding upon how to deal with such searches in warrant provisions, one is presented with three basic alternatives: (1) to provide, as no Canadian provision currently does, that personal search may be authorized in a warrant to search places or vehicles; (2) to follow the basic approach of the narcotics and drugs provisions (although with possible modifications) by providing an independent statutory power to search persons as an incident of a warranted search of places or vehicles; or (3) to leave the executor of the warrant to rely upon independent sources of authority to search persons, as is currently the case with searches under section 443 of the *Criminal Code*. We have concluded that the first alternative is the best one.

282. The third course gives full expression to the view that each personal search represents a distinct intrusion. By according no significance to the fact that the individual is found in the place or vehicle searched, it puts the peace officer in the same position he would be in if he encountered the individual on the street. Its weakness lies in the artificiality of separating all personal searches from their context: the warranted search of places or vehicles. This is not simply a physical context but, more importantly, a context of purpose. It may happen that an officer wishes to search a person for reasons that are unrelated to the purpose of the warranted search, such as the apprehension that the person is carrying a dangerous weapon. But this need not always be the case; on the contrary, the officer may be searching the persons found on the premises for the same objects of seizure as those mentioned in the warrant. In such cases, it seems only sensible to view the personal search in the context of the search as a whole.

283. What is different about the undertaking of personal search, of course, is that personal security and not merely a spatial domain is being violated. And it remains critical that each individual in the place or vehicle be protected from a search of his person unless reasonable grounds exist to believe that he himself is in possession of

an object of seizure. The critical question is whether the decision as to the existence of these grounds should be confided to the original warrant issuer or to a peace officer.

284. To leave the matter solely to the determination of the peace officer raises certain objections. It gives the officer what is essentially a power to make warrantless searches, without offering a convincing reason for abdicating all warrant protections. There are a number of arguments to be made against requiring a *second* warrant application to be made from the scene of the search: the possibility of urgent circumstances, the inefficiency of requiring two separate applications, the marginality of benefits received from such an application compared to its inconvenience. But what factors argue against giving the issuer of the warrant responsibility in this respect on the *original* application?

285. The basic problem is that the issuer is in an inferior position to ascertain the likelihood of whether an individual encountered in a place or vehicle is carrying or concealing an object of seizure. Whereas the officer has the advantage of being aware of the circumstances encountered during the search of the place or vehicle, the original issuer can only be cognizant of factors known before the search is undertaken. There may be no basis upon which it may be predicted, at the stage of the application for the warrant, who may be in the place or vehicle, or which occupant might be in personal possession of the objects. And any hypothesis that might be developed before the search might easily be refuted once the search has begun.

286. To offer the issuer the power to authorize personal search entails some concession to the hypothetical and vague basis upon which his decision must rest. The problem of whether such a basis is a proper one upon which to issue a search warrant has plagued American case-law. The cases have focused upon the validity of authorizing searches of "occupants" of certain premises. It would appear that if there is reasonable ground to believe that all persons present at the anticipated scene are implicated in the offence, the warrant will be valid.[341] While the decisions evince a laudable concern that individuals on the premises not be searched without justification, they have viewed the issue of grounds to search at a collective level: if all occupants are sufficiently implicated to be searched, a search of each one of them may be authorized. Although it may well be that only a few individuals on the premises are so implicated, the issuer is faced with an all-or-nothing proposition.

287. We propose that the best solution to the problem is to divide the responsibility for determining the question of personal search between the issuer and the peace officer. To the issuer should go a kind of clearance function. If, when the issuer grants the initial warrant, it appears that the "objects of seizure" named in the warrant may be concealed upon persons in the place or vehicle to be searched, he should be empowered to include a clause on the warrant authorizing the officer to search persons. However, the officer should be permitted to search only those persons whom he reasonably believes to be in possession of these "objects of seizure". Not only does such a compromise balance the "judicial" protections of the issuer's decision with the informed basis of the officer's judgment, but by using the warrant to confer authority upon the officer, it communicates that authority to the occupants of the place or vehicle searched.

D. Medical Examinations and Searches of the Mouth

288. Probings of body orifices, intimate sexual searches, and strip searches are clearly very intrusive procedures. As well as being an aspect of search and seizure, these same procedures may also be performed for other investigative purposes, e.g., in order to obtain samples of bodily substances from a suspect in custody. Whether as an aspect of search and seizure, or as an aspect of what we refer to as "investigative tests", we believe that these procedures should be carefully prescribed by law. For present purposes, we make recommendations only as these procedures relate to powers of search and seizure; in a subsequent Working Paper, we will be considering the procedures appropriate to investigative tests. It should be understood, however, that it may subsequently prove necessary to reconcile certain of the present recommendations with those that we will shortly be making in our Working Paper on Investigative Tests. This task we expect to reserve for our respective Reports to Parliament on Search and Seizure and Investigative Tests.

289. The need for special rules governing visual examination and searches of body orifices and sexual organs was recognized by the Australian Law Reform Commission. The Australian Commission's position was summarized as follows:

> The intention of the Commission is to confine the power of search incident to arrest to light body search of the so-called "frisk" type. The more intrusive searches of the surface of the body, or various cavities

thereof, should be carried out only in accordance with provisions governing medical examinations. Obviously it will be difficult in many cases to draw the line between what is a personal search, which can be carried out by a police officer, and what is a medical examination, which in our recommendation can be carried out in the absence of consent only by a medical practitioner pursuant to a court order. The Commission is of the view that search of the body surface, even if only superficial scratches or bruises, should be construed as a medical examination to the extent that it involves any invasion of the modesty or dignity of the person concerned, as by the shedding of clothes and so on. It is difficult to draw this kind of distinction clearly in statutory terms. Much will clearly depend on the willingness of the courts to draw the appropriate distinctions when practical situations come before them, upon the discipline enforced by senior police officers and upon the response of all officers to the principle advanced here.[342]

290. The Australian proposal is basically oriented towards three objectives. First, it affirms personal dignity by expanding the definition of medical examination beyond intrusions into the body and encompassing strip searches generally. This position recognizes what was evident in the findings of the Pringle Report:[343] that it is the exposure, rather than the probing of the orifices of the body, that is the primary intrusion made in the course of an intimate search. The point was also made by the minority of the British Advisory Committee on Drug Dependence, which called for special protection against what it termed "embarrassing" inspections of underclothes and the naked body.[344] We give further recognition to this concern by requiring that the examination be conducted in circumstances respectful of the privacy of the person to be examined.

291. The argument may be put, of course, that no matter how serious the offence, the violation of human dignity implicit in a vaginal or rectal examination is intolerable in a free society. Proponents of this argument, however, often concede that there is a legitimate interest in obtaining some secreted items (*viz.* condoms containing heroin), and suggest alternatives open to the police, such as incarceration and supervision of the individual, and constant inspection of his or her body wastes. These alternatives themselves are hardly more respectful of human dignity than a rectal or vaginal probe conducted in appropriate surroundings by a medical professional; they may be even seen as less so. In the result, we suggest that the proposals contained in our Recommendation are the best available set of rules for an inevitably distasteful task.

292. Second, the Australian proposal requires that rectal and vaginal searches, when they are conducted, be performed by

qualified medical practitioners, and therefore involve a minimum of pain and risk of injury to the individual searched. In Canada, this concern has been manifested in the Pringle Report[345] and incorporated into a number of police instructional materials.[346] By restricting the permitted practices to medical "examinations", the proposed law clearly would exclude the more dangerous kind of operation attempted in the *Laporte* case,[347] as well as such brutal tactics as force-feeding of emetics which so incensed the United States Supreme Court in the *Rochin* case.[348]

293. Third, the proposals would preclude conducting a medical examination without the specific authority of a judicial order. We believe that these intrusions are sufficiently serious that they should not be permissible without prior judicial authorization. Moreover, it might be noted that the various orifices of the body generally do not lend themselves to the destruction of evidence so much as to its secretion. While it is physically possible to use internal surfaces to absorb, and hence prevent seizure of, various narcotics,[349] the internal search of an individual is usually predicated on the belief that the substance has been carefully concealed in the body for transportation purposes, a belief that assumes that the carrier is preserving the substance. Therefore, as a general rule, the "urgency" factor necessary to justify resort to warrantless search in the absence of consent is not present.

294. The major exception to the policies outlined above involves the mouth, searches of which are particularly relevant in narcotics cases. In the *Scott* case, Urie J. discussed a search of the plaintiff's mouth as follows:

> According to the evidence, it is well known to police officers engaged in drug law enforcement that suspects hide narcotics contained in a balloon or a condom in their mouths. The uncontradicted evidence was that the purpose of the application of the throathold by Sergeant Siddle was to ascertain whether or not the respondent had narcotics in his mouth. That is, he was conducting a search of the person as authorized by the statutes. Since the evidence also indicates that the only satisfactory methods for recovering narcotics hidden in a suspect's mouth and to prevent him from swallowing them to avoid their recovery is to apply such a hold, it would appear to be a lawful act, at least in the absence of evidence of undue force in its application. To find otherwise would, in my opinion, make a realistic search for narcotics a mockery and to a large extent negate the practical use of ss. 10(1) and 37(1).[350]

295. The existence of the practice of swallowing narcotics to prevent their seizure may be well known, but the *Scott* decision

raises some concern in its evident condonation of mouth searches as a general police exercise. It was in fact found that there were no reasonable grounds to believe that narcotics were concealed in the plaintiff's mouth; the search was conducted rather to "ascertain whether or not" narcotics might be found there. This exploratory rationale contradicts the positions taken in this paper that an individual should not be subjected to a search unless grounds pertaining to himself exist.[351] Assuming these preconditions to be satisfied, however, the question remains as to whether, given the painfulness and danger inherent in a search of the mouth, it ought to fall within the medical examinations provisions, or whether the demands of law enforcement justify making it, so to speak, an exception to the exception.

296. It would appear that, while undeniably a drastic measure, a mouth search by a peace officer may well be at times a necessary one to prevent the destruction of evidence. And while possessing the invasiveness of any assault upon the person, it does not involve the embarrassment and threats to dignity which strip searches and other internal searches entail. Accordingly, we propose that the requirements for a warrant and qualified medical practitioner applicable to special medical examination provisions should not obtain in searches of the mouth. We attempt to compensate for the removal of these protections with the requirements that an *ex post facto* report be prepared and that the search be performed in a manner not dangerous to human life or safety.

297. The one major weakness of the Australian proposal for medical examinations is that it allows the investigation of any offence to justify the intrusion. We recommend, however, that these searches be confined to cases in which the seriousness of the social interest demanding intrusion truly balances with the seriousness of the intrusion. Given that rectal, vaginal, and mouth searches are often undertaken in narcotics and drugs investigations, there is still a wide disparity between the search of an alleged possessor of marijuana and that of an alleged trafficker in heroin. Indeed, this distinction has been made in an R.C.M.P. operational manual:

> When conducting investigations involving small amounts of cannabis, members of the Force should not resort to the investigational techniques utilized in the investigation of offences involving heroin or other similar narcotics. Seizing a person by the throat or subjecting suspects to complete strip or internal searches will normally be considered excessive. If members do resort to these investigational techniques, they must be prepared to justify their actions.[352]

298. The classification of offences under the *Criminal Code* is itself currently under scrutiny by the Law Reform Commission of Canada, and it is difficult to discern in current criminal legislation any consistent standard by which an offence could be classified as deserving or not deserving of resort to medical examinations. Perhaps the best approach would be therefore the one taken in drafting existing wire-tap legislation: to limit the application of the regime to specific offences listed by Parliament in a special definition section.[353] This approach to medical examinations was taken by the Victoria Chief Justice's Law Reform Committee, and we recommend its adoption.

V. Release of Information about the Search and Seizure

299. By the time a search has been executed or a seizure has been made, the police are likely to be in possession of significant information about an individual whose interests have been infringed by the intrusion. At the least, they will know why and how the search was conducted, and whether or not a seizure was made. If a warrant has been issued, the office of the issuer should also be in possession of information which has been provided in the application for the warrant. The factual datum in the possession of the police and issuer is naturally of concern to any individual to whom it relates. It may also interest an institution, such as the press, which is not directly involved in the investigation. The institution's interest in turn affects the individual. The dissemination of police information may result in the exposure of previously private facts about his life and activities. The police, on the other hand, may wish to restrict the flow of information in their hands, in order to safeguard their sources and preserve their investigation.

300. The primary concern underlying rules governing the flow of information about a search or seizure is accountability. In this respect the differences between warranted and warrantless searches and seizures are acute. In the former case, accountability should begin with the application to the warrant issuer and his evaluation of the applicant's request. But even if the procedure for obtaining warrants in certain jurisdictions has been perfunctory and subject to

manipulation by the police, there is still some benefit in terms of accountability derived from the record which the information and warrant provide for subsequent examination, review and challenge. Where "returns" to the execution of the warrant are filed as required by section 443, these too provide a measure of accountability. Why should such benefits not accrue as well to an individual affected by a warrantless intrusion?

301. To some extent, this is attributable to certain distinctions between the source of the peace officer's authority in the two instances. Historically, the constable's warrant identified him as the delegatee of the justice of the peace for the purpose of carrying out the justice's law enforcement functions. This relationship is still notionally preserved in some aspects of warrant procedure such as the provision for "return" of the warrant and items seized to the justice under section 443 of the *Criminal Code*. By contrast, in the case of a warrantless provision, the peace officer is the direct holder of a statutory power. In the absence of specific legal or administrative provisions to the contrary by law, he is not accountable to any superior official for having exercised it. But primarily, the difference in accountability would seem to be based on the exclusive association of a "judicial" element with the warrant procedure. Many of the existing accountability mechanisms are traceable to this association, and its corresponding absence in the case of warrantless search powers has meant that parallel or similar mechanisms have not been conceived as appropriate in the latter case.

302. Do these factors still justify the existing discrepancies? In terms of present-day realities, the peace officer is no longer the subordinate constable being sent out to perform the functions delegated to him by the justice. Rather, it is the peace officer who almost invariably initiates the warrant procedure, ascertaining the basis of the underlying complaint and preparing the application and warrant for the justice's signature. More importantly, while the maintenance of a "judicial" character should continue to be an objective of warrant procedures, it may be misleading to isolate this objective as the major rationale for supervising powers of search and seizure with warrant. Rather, the "judicial" protections may themselves be instrumental; they themselves have been built into warrant procedures because of the perceived importance of protecting individuals from the unjustified exercise of intrusive powers.

303. In making recommendations concerning the maintenance and release of information about a search or seizure, we attempt to

balance the different considerations raised in instances of warranted and warrantless search. While not rejecting entirely the factors mentioned above, we have attempted to close the gap between the accountability mechanisms available in the two instances.

A. Search with Warrant

RECOMMENDATIONS

34. An issuer of a search warrant should be empowered to exclude persons from a search warrant hearing where it appears to him that the ends of justice will best be served by making such an order.

35. An individual affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath immediately after the execution of the warrant. Other persons should be granted access to these documents but should be subject to a prohibition against publishing or broadcasting their contents until:

(a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;

(b) the individual affected is discharged at a preliminary inquiry; or

(c) the trial of the individual affected is ended.

36. If the release of either an information or warrant would be likely to reveal the existence of electronic surveillance activities, the issuer of the warrant, upon application by the Crown or a peace officer, should be empowered to obscure any telephone number mentioned on the document and replace it with a cypher. Similarly, if the identity of a confidential informant would be jeopardized, the peace officer or issuer should be empowered to obscure the name or characteristics of the informant and replace them with a cypher. In either case, upon so doing, the issuer should attest on the document that the only facts so obscured are the digits of a specific telephone number or name and characteristics of an informant, as the case may be.

304. These recommendations respond in part to the recent decision of the Supreme Court of Canada in the *MacIntyre* case,

which primarily involved the issue of whether the public ought to be entitled to access to records of search warrant proceedings. By a five to four majority, the Court adopted a modest position in favour of public access. Dickson J., writing for the majority,[354] held that after a search warrant had been executed and any objects seized as a result brought before a justice, a member of the public is generally entitled to inspect the warrant and supporting information. Martland J., dissenting,[355] took the view that access to these documents should be restricted to persons showing a direct and tangible interest in them, a class that in his view did not include the respondent MacIntyre, a reporter who claimed no interest above that of the general public. The Court's decision did not purport to lay down anything more than certain common law propositions; if Parliament deemed it appropriate, these propositions could be modified by statutory provision. We believe that the interests of clarity call for legislative treatment of three issues raised in the case. These issues are: Should access to the hearing of the application be curtailed? Under what circumstances, if at all, should an individual affected by a search be entitled to examine the warrant supporting information on oath? Under what circumstances, if at all, should members of the public and the press or media be so entitled?

305. The Nova Scotia Court of Appeal decision in *MacIntyre* held that the issuance of a search warrant is a judicial act performed in open court: "The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant".[356] Both the majority and minority in the Supreme Court of Canada rejected this view, however. As Dickson J. observed,

> [t]he effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless.[357]

We agree with this position and accordingly give the warrant-issuer the power to exclude persons from a warrant hearing.

306. The need to control information about the search warrant hearing is diminished after the warrant is executed, both because the individual affected knows about the police investigation by virtue of the search itself and because the police have had their opportunity to make the authorized seizures. The case for giving the affected

individual access to the warrant and information at this point was recognized by both the majority and minority in *MacIntyre*. It was perhaps most succinctly put in *Realty Renovations Ltd.*, a case that preceded *MacIntyre*:

> It is abundantly clear that an interested party has the right to apply to set aside or quash a search warrant based on a defective information. In order to make such an application the applicant must be able to inspect the information and also the warrant and must be able to do so immediately the warrant is executed.[358]

We incorporate this position into Recommendation 35.

307. The benefits of giving access both to the public at large and to institutions such as the press which serve it may harmonize with the individual's concern, but this is not necessarily so. As was the case in *MacIntyre*, a journalist may be interested in exposing the activities of the persons named in the warrant as much as checking on the propriety of the police activities against them. The interest that conflicts with public access in this instance is that of the individual's own privacy. Given the wide reach of the media, information about a search may cause the individual serious embarrassment. Privacy legislation at the federal level specifically protects "information relating to the ... criminal history ... of the individual" from disclosure to others,[359] and American law explicitly recognizes that release of information about criminal investigations may constitute an undue invasion of privacy.[360] On the other hand, damage to privacy is a danger acknowledged by law-makers in exempting courts from protection of privacy legislation. The public scrutiny necessary to ensure the fairness and quality of judicial proceedings entails exposure of embarrassing facts about individuals.[361]

308. In *MacIntyre* itself, the majority resolved this issue by reference to the policy of "protection of the innocent". It held that "where a search is made and nothing is found", arguments of public access gave way to concerns for the individual's privacy, but where objects were seized the interests in favour of access prevailed.[362] We hesitate, however, to make such a direct association between the results of a search and the question of an individual's guilt or innocence. A guilty individual may have removed wanted items from his premises; an innocent party may be in possession of relevant evidence seizable under a warrant. Our preference, rather, is to distinguish between access to the warrant and information and publication of their contents.

309. It is important to recognize that the public interest in publicizing procedures at the pre-trial stage is not as strong as at the trial stage. Indeed, the exposure of pre-trial proceedings may threaten the integrity of the trial system as well as enhancing it — by disclosing evidence that may not be introduced subsequently in court, or by tainting the person searched with culpability before he has been charged. The former concern has been enhanced by the introduction of a limited exclusionary rule against illegally obtained evidence in subsection 24(2) of the *Canadian Charter of Rights and Freedoms*.[363] It is also relevant to note that search warrant hearings, while ancillary to criminal procedure, do not involve the kind of final determination of culpability or liability that characterizes the trial and makes publicity "the hallmark of justice" in that context.

310. Perhaps the stronger case for unrestricted rights of publication resides in the violence that restrictions do to freedom of the press. The constitutional protection of freedom of the press as recognized in the *Canadian Bill of Rights*[364] was recently invoked by the Manitoba Court of Appeal in the *F.P. Publications* case. In quashing an order excluding a reporter from a trial, the Court recognized the reporter's freedom to report the names of witnesses at the trial, despite the embarrassment this might cause to the witnesses.[365] But, although the judgments of the majority in the case are spirited in their defence of the press, it would be misleading to take the ratio of the judgment outside the context of the trial proceeding itself. Indeed, two specific provisions in the *Criminal Code* make it clear that at the pre-trial stage, freedom of the press must bend to some extent to accommodate the individual's own wish to control information about the investigation against him.

311. Both at preliminary inquiries and show-cause hearings, a justice is required, upon application by the accused, to impose a non-publication order covering the evidence and representations made before the court.[366] The order lasts until either the accused is discharged at a preliminary inquiry or the trial of the accused is ended. Search with warrant generally precedes both the inquiry and the show-cause hearing, and unlike the accused in either case, the individual mentioned in a search warrant has not necessarily been charged with an offence. Neither the public interest nor the stake of the press in disclosing investigative facts against the individual's will would appear to be more compelling in the case of search warrant hearings than in the cases in which the benefit of a non-publication order is already recognized.

312. The major difference between the contexts is that the absence of the individual from the warrant hearings precludes him from making the application for protection available to an accused before a court. We recommend, therefore, that an order similar to that obtainable at preliminary inquiries and bail hearings be imposed automatically upon the issuance of a search warrant, but that this order be revocable upon the application of the person concerned. We do not accept, however, that this right of the individual concerned to obtain revocation of the order should be absolute. For one thing, the examination of a warrant or information upon oath may involve the disclosure of facts about a number of different individuals. While some of these persons may wish to publicize their case, others may wish to avoid exposure. The complex issues that could arise in such situations could be determined sensitively if presented to an adjudicator of a high-level court.

313. It is recognized that, allowing for what is in effect conditional public access to search warrant documents entails certain risks. The suggestion is made by police and Crown officials that such a step could lead to a reduction in the details disclosed in their applications. It is important to put this argument in perspective, however. It is true that some documents, notably those relating to commercial crime, are prepared with an almost artistic devotion to detail, and that officials preparing these documents might well be concerned about the exposure of names and sources included on these documents. However, the likelihood is that many of these details are superfluous in terms of the legal standards that actually govern applications and warrants. The more common warrant document, by contrast, is one that falls short of even the basic legal criteria — 58.9% of the warrants evaluated by the judicial panel were invalid, and of those found to be valid, many included terse but minimally sufficient descriptions of items, premises, offences and grounds to believe. It seems possible that the effect of public exposure could be to modify practices at both extremes: reducing detail on the meticulous warrants while bolstering standards on the manifestly inferior ones. If this is the case, it is suggested that the sacrifice incurred at the higher stratum is justified by the improvement at the lower end.

314. One area of particular concern is the possibility that public access to search warrants could frustrate electronic surveillance activities. As was suggested earlier, the relevant concern in the evaluation of a warrant application founded on a wire-tap is not the identification of the wire-tap itself but rather the facts it discloses.

However, there is one kind of search in which the tap is inevitably identified in both the information and the warrant: a search for records relating to the telephone number itself. Such searches are often conducted upon telephone company premises.[367] If the fact of the search for the records became publicly available, the individual concerned might well be alerted. In order to avert this situation, court officials, at the request of the police or Crown, could be empowered to delete the actual telephone number from the documents accessible to the public, and replace it with a cypher. So long as it was attested by the issuer of the warrant that the cypher represented a specific telephone number, no significant sacrifice would be made in terms of the capacity of the public to evaluate or monitor the standards of warrant procedures. Analogous policies are proposed with respect to the identities of confidential informants.

315. In advancing Recommendations 34, 35 and 36 we are aware of both the controversy surrounding the *MacIntyre* decision and the acute conflicts that emerge when police are required to disclose intricate and sensitive investigations in an open judicial forum. While the present set of proposals represents a defensible balance of the competing interests, we realize that they may seem too secretive to some and insufficiently confidential to others. In preparing the parts of our final reports on police powers and procedures concerning release of information about searches and seizures with warrant, we would be greatly assisted by comments on, or criticisms of, our present proposals.

B. Search without Warrant

RECOMMENDATION

37. A peace officer should be required to complete a post-search report in the following circumstances:

- **(a) where objects are seized without warrant;**
- **(b) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to Recommendation 24;**
- **(c) where a search of a person's mouth is conducted, pursuant to Recommendation 33.**

The report should include the time and place of the search and/or seizure, the reason why it was made and an inventory of any items

seized. It should be available on request to an individual affected by the search or seizure described in the report.

316. That a particular search or seizure activity is attended by such conditions as to justify an exception to the requirement of obtaining a warrant does not remove the need for accountability mechanisms. It might even be argued that the more defensible inclination would be to augment accountability mechanisms so as to make them effective as sources of *primary* rather than *secondary* protection against unjustified search. We do not accept, however, that it would be beneficial to require full-scale reporting of all warrantless searches and seizures, so as to provide a record as extensive as that available in cases of search and seizure with warrant. In part, this position is based on the recognition that the judicial character of warrant procedures is a matter of some weight. In part, it is based on the observation that some of the concern for accountability and access to information may be met by Recommendation 27, concerning the giving of reasons for the search. However, there are three other considerations that deserve attention: (1) the costs of requiring the scale of reporting characteristic of warrant procedures in all cases of warrantless searches and seizures, (2) the significance of the encroachment upon individual interests represented by different variations of search and seizure activity, and (3) corollary dangers arising from increasing reporting requirements.

317. It is a truism of police work that the reporting of occurrences involves a drain on resources. Traditionally, this drain has been viewed in terms of the "paperwork" that a peace officer is required to complete. Some of this expenditure has been transferred in recent times into computer systems in which information acquired by the police has been processed and stored. The exact nature of the expenditure entailed in requiring full-scale reporting for warrantless searches and seizures would be somewhat dependent on the division of functions between paperwork and computers. However, it seems inevitable that putting such requirements into practice would place an increased strain on the reporting capacities of police forces. This assertion is based on the likelihood that, despite the preference in principle for utilization of a warrant and the improvements in warrant procedure suggested earlier, warrantless searches, particularly of persons and vehicles, will continue to heavily outnumber warranted ones.

318. Can such an expenditure of resources be justified by the benefits received from it? It is accurate to say that any deprivation of

human liberty or violation of bodily integrity represents an interference with interests accorded significant importance in Canadian legal tradition and under the new *Canadian Charter of Rights and Freedoms*. However, it would seem that in many cases, the violation of individual interests is a limited one. Particularly in cases of non-resultant searches of vehicles and persons, the effect of the police action may have been a relatively fleeting deprivation of the individual's rights: a stop and a check or frisk for stolen property or weapons, following which the individual is allowed to go his way. While it remains essential to reduce even such fleeting episodes to truly justifiable cases, it is open to doubt whether striving for this objective justifies imposing draconian record-keeping burdens on the police for all search and seizure practices.

319. This position is fortified when one considers the implications for individual privacy that flow from detailed record-keeping. These implications would arise from the anticipated use of computers to process and store information about warrantless searches and seizures. Problems involving privacy and computers are, of course, larger than the context of criminal law enforcement, and the struggle to resolve them can hardly be said to be over.[368] In the specific case of search and seizure, the prospect of recording in a computer every incident in which an individual is stopped and searched by a peace officer is a dangerous one: it possesses dimensions of an Orwellian world that can hardly be reassuring to an individual whom search and seizure procedures strive to protect. These dangers would be compounded if the prospect of access to police information by outside parties were given serious attention.

320. Our recommendations attempt to strike an acceptable balance between the conflicting interests and arguments noted above. Generally, the performance of a search without warrant should not in itself lead to mandatory reporting procedures. However, such procedures could be triggered by one or more of a number of circumstances. First, making an arrest may invoke its own set of reporting requirements; the law of arrest is the subject of a separate Commission Working Paper. Second, as an administrative matter, in a case of search performed pursuant to consent, the written authorization to search proposed in Recommendation 6 should be kept by the police and filed. Third, when a search involves a particularly intrusive activity such as a probing of the mouth, an *ex post facto* report of the search should be mandatory.[369] Fourth, a similar report should be required in cases in which an actual seizure of things is made without a warrant.

321. Detailed *ex post facto* reporting requirements are currently set out in R.C.M.P. guidelines concerning writs of assistance. Another model for an *ex post facto* report is provided by the *ALI Code*:

> *Report of Seizure.* In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things seized [to a judge of a court having jurisdiction of the offence disclosed by the seizure].[370]

We recommend that a post-search report, containing the time, date and place of the search and/or seizure, the reasons why it was made and an inventory of items seized, be made a part of Canadian law as well.

CHAPTER EIGHT

Departures from the General Rules

322. The discussion in the previous three Chapters attempted to articulate a balanced regime of warranted search and seizure powers, both in terms of justifications for intrusion and procedural mechanisms. In the interests of simplification and coherence, this task was undertaken with a view to creating one generally applicable body of rules. Yet as much as the development of general rules has drawn upon the range of different laws and practices, there are still some cases in which the general rules cannot be applied effectively. Some situations involving searches and seizures admit peculiar factors and particularly acute interests which can only be taken into account in exceptional rules.

323. In this Chapter, the need for certain exceptional provisions is approached in two distinct stages. First, we address problems that have emerged from the preceding discussions as deserving of special attention. These problems include searches of unsuspected parties, the freezing of financial accounts, and seizures of items from solicitors and the press. The issue addressed in each case will be the appropriate adjustment that ought to be made to take account of the exceptional factor introduced into the situation. The second section in the Chapter deals with the critical issue of surreptitious intrusions.

I. Special Problems Related to the Individual Searched or Object of Seizure

A. The Unsuspected Party

RECOMMENDATION

38. Where a party in possession of "objects of seizure" is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

(a) the party refuses to comply with the request within a reasonable time; or

(b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.

324. Once search and seizure powers are recognized as distinct from arrest and charging functions, the possibility arises of the police exercising these powers against an individual in possession of seizable objects, yet not suspected of being implicated in the offence to which these objects relate. This possibility is not simply an academic one. Searches of unsuspected third parties are a frequent, if not predominant, occurrence in cases of search with warrant. In the judicial panel sample from the Commission's survey, 20% of the warrants were issued for such searches. In 63% of the cases, on the other hand, the face of the application (information or report in writing) indicated that the owner-occupant was implicated. In the remaining 17%, the implication of the occupant could not be ascertained from the available documents.[371]

325. The unsuspected parties subjected to such searches include banks, telephone companies, institutions of the press, courier services, solicitors, and simply acquaintances of suspected individuals. In a number of these cases, special considerations are present, which bear upon the necessity of special procedures tailored to the circumstances of the type of party affected. As a general matter, however, two questions arise. First, ought unsuspected parties to be subjected to exercises of search and seizure powers at all? Second, short of complete immunity, are there any special

protections that ought to be accorded to such parties by virtue of their lack of suspected involvement in the alleged criminal enterprise?

326. No Canadian authority has gone so far as to assert that unsuspected parties might be totally immune to the exercise of search powers. The most extreme position taken has been that other less coercive techniques of acquiring things or information should be preferred. Such techniques might include a request or subpoena *duces tecum*. In the *Pacific Press Ltd.* case, Nemetz C.J.B.C. held that before the justice issued a valid warrant to search the premises of the newspaper involved, material should have been required to show: whether a reasonable alternative source of obtaining the information was or was not available, and if available, that reasonable steps had been taken to obtain it from that alternative source.[372] We question the value of this approach for two reasons.

327. First, it gives scant recognition to what has come to be recognized as the function of search and seizure to provide not merely evidence for trial, but also information to the police. Since the warrant is often used before the perpetrators of an offence have been identified sufficiently to lay charges, it is difficult to ascertain exactly who should be offered the alternative of a subpoena or voluntary compliance. The decision to give an individual the benefit of the doubt and to refrain from exercising a search power involves a possible risk of losing the items sought.

328. Second, this restrictive approach seems to assume that search and seizure powers must embody particularly coercive features. The very assertion of state control over the objects sought under search and seizure powers may be considered coercive in itself. If so, however, the alternative of a subpoena *duces tecum* is also coercive, since it requires the thing to be produced as ordered. Unlike the subpoena, of course, the notion of search contemplates the active participation of the police in finding the object, and their entry into the private zones of the individual. It is possible, however, to exaggerate this apparent distinction. Indeed, since a subpoena is required to be served personally by a peace officer,[373] the visibility of the police is not peculiar to search and seizure. Nor need a distinction lie in what the officer may do once he reaches the door and confronts the individual in possession of the object. In fact, the exercise of the search power may not lead the officer past the front door at all. In the vast majority of non-residential searches captured by the Commission survey (comprising for the most part, telephone companies, financial institutions and other business premises), the object sought was reported as having been "turned over on request".[374] That the

physical presence of the officer encouraged compliance with this request is obvious. What is significant, though, is that in these cases, the intrusive features of execution were minimal.

329. We believe that the better course lies in according the unsuspected individual the added protections truly appropriate to his "unsuspected" status. One approach evident in Canadian authority has been to require definite indicators on the face of the information, before permitting issuance of a warrant, thus elevating the relevant standards above those applicable to regular warrant procedures.[375] We believe, however, that what truly differentiates the unsuspected from the suspected party is the likelihood that in the absence of forceful action by the police, the things or information in the hands of the suspected parties sought may be lost. Thus the logical place to give additional protection to the unsuspected party is at the point of execution, where the question of methods of searching is primarily relevant. And since it is at this stage that the police really confront the individual, protection here is more immediate than at the issuance stage.

330. Special respect for the privacy of an unsuspected third party has been recognized in recent American legislation.[376] The legislation calls upon the Attorney General of the United States to issue guidelines incorporating a requirement that the police use the least intrusive method of obtaining materials in the possession of such parties which does not jeopardize the availability or usefulness of the materials. While similar guidelines should be included in Canadian police materials, the basic rules deserve to be codified in legislation.

B. Financial Accounts

RECOMMENDATION

39. Where "objects of seizure" are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge

or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

331. We recognized earlier that in principle "objects of seizure" ought to be covered by search and seizure procedure even though they have been converted into a loan or debt and offer no evidentiary potential.[377] There remain a number of practical difficulties, however, in applying this principle. In particular, how exactly should a "seizure" of the funds be effected? And how is the law to deal with the peculiar accounting problems of identifying the seizable funds from a potential maze of financial transactions that might have been carried out by the individual concerned?

332. "Seizure" in this context was earlier defined as the acquisition of control over the funds sought. One way to exert control in this regard is by means of a freezing or restraining order, such as that set out in section 12 of the *Business Practices Act* in force in Ontario.[378] This provides that in conjunction with certain investigations, a designated official may, if advisable for the protection of an investigated party's consumers,

> direct any person having on deposit or under control or for safekeeping any assets or trust funds of the [investigated] person ... to hold such assets or trust funds or direct the [investigated] person ... to refrain from withdrawing any such assets or trust funds from any person having any of them on deposit or under control or for safekeeping or to hold such assets or any trust funds of clients, customers or others in his possession or control in trust for any interim receiver, custodian, trustee, receiver or liquidator ... or until the Director revokes or the Tribunal cancels such direction or consents to the release of any particular assets or trust funds from the direction ....

Adaptation of this provision to cover criminally acquired funds held in bank accounts was recommended by the Uniform Law Conference in 1979, with the proviso that the order be made by a superior court judge.[379]

333. Alternatively, the amount of the proceeds could be taken out of the individual's account and transferred to another account registered in the name of the police. The latter method has indeed been used on occasion by some Canadian forces, although the basis for doing so under present legislation has never been clear. According to Recommendations 2 and 11, however, once funds were determined to be "takings of an offence" or "funds possessed in circumstances constituting an offence", their seizure clearly could be authorized by

a warrant. This alternative possesses the advantages of respecting conventional protections associated with search and seizure with warrant, perhaps most significantly the "particularity" requirements governing the descriptions of the offence alleged and objects of seizure. These protections may be contrasted with the more general and tentative links between an offence and funds, which are characteristic of freezing order legislation. This is true not only of the Ontario model but of statutory regimes designed with specific reference to commercial crime. The Henderson Report in British Columbia, for example, proposed a statutory regime including interim freezing orders against property which "may be subject to forfeiture" as part of a criminal enterprise or profits of a criminal enterprise.[380]

334. The absence of such protections from a freezing order scheme may be balanced somewhat by the circumstance that such orders typically leave possession of the property covered by the order with the private individual affected by it. For example, a section in the American Racketeer Influenced and Corrupt Organizations legislation permits courts

> to enter such restraining orders or prohibitions, or to take such other actions, including ... the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture ... as they shall deem proper.[381]

What this suggests, however, is that such provisions may be less in the nature of search and seizure powers than court orders such as injunctions. This impression is enhanced by the legislation's reference to such alternatives as acceptance of performance bonds and the coverage of species of property such as land which have remained outside the traditional ambit of search and seizure powers. It is also enhanced by recent English case-law, which has recognized injunctions rather than search and seizure powers as the appropriate procedures for controlling criminally obtained funds in bank accounts.[382]

335. Accordingly, we restrict our consideration of freezing orders to those that might be required as ancillary to search warrants in this regard. Is there any aspect of the problems entailed in seizure of financial accounts that might require such a special feature? One such aspect is the complexity of the transactions the police may be investigating. This complexity often makes it difficult to isolate the funds representing the proceeds until financial records of the individual have been seized as well. Since the seizure of these records, if communicated to the individual, might result in the

transfer of funds out of his account, police attempting to identify the relevant money are liable to find themselves in a dilemma. In this sense, a freezing order procedure, fixing as it does upon the account and not upon any identified money inside it, is advantageous to the police.

336. However, this argument does not go so far as to prove the need for the kind of freezing order scheme outlined in the *Business Practices Act*. It does show the usefulness of a temporary freezing order pending identification of the funds. Upon obtaining a warrant to seize the financial records of an individual, peace officers could also obtain a temporary freezing order, directed to the financial account into which the relevant funds are reasonably believed to be traceable. Rather than lasting until a subsequent hearing, an order would expire after a specified and reasonable period of time. If the police were not prepared to obtain a regular warrant for the funds being sought by the time of expiry, the account would cease to be frozen.

337. It is recognized that the imposition of any such temporary order represents a departure from the standards inherent in conventional rules of warrant procedure. As such, it needs adequate safeguards. Primarily, the duration of such an order should be as short as the demands of investigation permit. Setting a statutory time limit, as in the case of deadlines for execution, is inevitably somewhat arbitrary. Discussions with police, however, indicated that a thirty-day period, with opportunity for renewal if necessary, could prove workable. Second, the amount of funds frozen should in no case exceed the funds identified with the offence. Third, given the degree of conjecture and complexity that could be expected to characterize police identification of the funds at this preliminary stage, and the correspondingly greater judicial scrutiny and discretion required, we recognize that resort to a superior court judge or judge as designated under section 482 of the *Criminal Code* is appropriate for the freezing order itself. And finally, as in the model Ontario legislation, the person affected by the order should have a right to apply immediately to the court to cancel it.

338. Our recommendation is a limited one in that it is specifically directed to funds in financial accounts. This limitation reflects our perception that, although temporary restraining orders could be instituted with respect to assets such as securities or negotiable instruments, they would be unlikely to be effective as an aid to a search and seizure power. Ultimate "seizure" of such property by the police, in the sense of acquiring control or possession, would be complicated by questions of administration and

disposition not evident in the case of funds. We view the critical issue with respect to these species of property, as indeed with realty, as being the need for long-term restraining orders such as those contemplated by the Henderson Report. This complex and significant issue is beyond the scope of the present Working Paper.

C. Solicitor-Client Privilege

RECOMMENDATION

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

339. Under amendments introduced in the *Criminal Law Amendment Act, 1978*, a new section 444.1 would have been introduced into the *Criminal Code*.[383] It would have provided for a special procedure to deal with documents seized while in the possession of a lawyer, by requiring that, upon a lawyer's claim that documents to be seized were privileged, the officer making the seizure place the documents in a sealed package without examining or copying them. The package having been placed in the hands of a suitable custodian, the lawyer or his client would have fourteen days to make an application to a judge. At the hearing of the application, the judge would be required to inspect the sealed documents and then decide summarily the claim of privilege. In cases in which privilege was found to exist, the custodian would be ordered to return the document to the applicant and the document would be inadmissible as evidence unless privilege were subsequently waived. If no privilege was recognized, the document would be delivered to either the police or the Crown.

340. The implementation of this set of provisions would resolve a dispute that has plagued recent case-law as to when solicitor-client privilege may be asserted. As this Working Paper is being completed, the matter is before the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*.[384] In the meantime, the restrictive position, represented in decisions such as *R.* v. *Colvin; Ex parte Merrick*,[385] has been that

the privilege is simply evidentiary and accordingly can only be raised at trial. The expansive position, on the other hand, would allow the privilege to be raised at the investigative stage. In *Re Director of Investigation and Research and Shell Canada Ltd.*, Jackett C.J., dealing with seizure powers under the *Combines Investigation Act*,[386] stated:

> It is sufficient to say, in so far as this matter is concerned, that it has been recognized from very early times that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in .he law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.[387]

We accept the policy articulated by Jackett C.J. and accordingly view the proposed section 444.1 as a progressive and sound step. However, we note two distinct weaknesses in the 1978 legislation.

341. First, it restricts the documents covered by the privilege to those in the possession of the solicitor. This was recognized by the Manitoba Law Reform Commission in its criticism of similar provisions already in effect under the *Income Tax Act*:[388]

> As is often the case, however, documents in the possession of the client, his accountant, or some other party may also be subject to solicitor-client privilege .... Presumably, then, while privileged documents in a lawyer's possession could be removed from his control, the same documents in the hands of the client could be withheld from department officials by virtue of the common-law doctrine of privilege. This interpretation of the law clearly points out that if a statutory mechanism for the invocation of solicitor-client privilege is to be employed, it must be comprehensive and apply to all documents, regardless of their location.[389]

We concur with this position.

342. Second, the procedure does not recognize the legitimate interest counsel have in examining the documents before presenting their cases before the judge. While the judge has the explicit duty to inspect the relevant documents, there is no statutory power given under the 1978 amendments to either counsel to do so. Although counsel for the solicitor might be presumed to know the nature of these documents, it would be expected that the Crown would be ignorant of them unless given a right of access. Indeed, counsel for the solicitor might well wish to examine the sealed package himself for the purpose of preparation. It would appear useful, therefore, to give counsel for both parties statutory rights of access to the

documents, with certain stipulations to ensure that Crown counsel would not benefit from this access were the judge to find the documents protected. Two stipulations seem appropriate. First, Crown counsel on the application should be precluded from further participation in the investigation or prosecution of the matter to which the application relates. Second, he should be under a duty not to disclose the contents of the sealed package.

D. Searches of the Press and Other Media

RECOMMENDATION

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

343. The *Canadian Charter of Rights and Freedoms* recognizes "freedom of the press and other media of communication" as a fundamental freedom existing in Canada.[390] Does this give the press any special protection against the exercise of search and seizure powers by the police? This question has been addressed in recent case-law both in Canada and in the United States. The case-law has been specifically focused. It does not suggest that an institution of the press deserves any measure of added protection when it is itself a suspected party in an offence. Rather, the debate has been concerned with the vulnerability of the institution when it is not a suspected party, but merely a holder of relevant things or information. For example, a reporter or photographer may have recorded events of an allegedly criminal nature. Should the police be entitled to obtain a warrant to search for and seize such a record in the normal way?

344. An exhaustive consideration of the question appears in the various judgments in *Zurcher* v. *Stanford Daily*, in which the United States Supreme Court held that a warrant issued to search the premises of a campus newspaper was constitutionally valid.[391] The dangers the minority identified with the use of search powers included the unconfined examination of files unrelated to the specific investigation and unnecessary disclosure of confidential sources. This prospect of random search was rejected by the majority, which relied instead on case-law which insisted "that the courts apply the warrant requirements with particular exactitude" when freedom of

the press was threatened. Since the warrant in the *Zurcher* case itself complied with these requirements, it was found to be valid. However, following the Supreme Court decision, legislation was enacted restricting powers to search and seize materials in the possession of journalists.[392]

345. A similar policy of imposing the general safeguards with greater strictness underlies the decision of the British Columbia Supreme Court in the *Pacific Press Ltd.* case. The result, however, was the opposite: the warrant to search newspaper offices was invalidated on the basis that sufficient grounds had not been presented to the issuing justice. Nemetz C.J.B.C., after canvassing British and American authorities, stated:

> Where, then, does the matter stand in Canada? Counsel for the petitioner submits that Parliament has accorded the free press a special place under the *Canadian Bill of Rights*. Accordingly, he argues, ss. 1(*f*) and 2, must be taken into consideration and weighed by the Justice of the Peace before he exercises his judicial discretion to grant the issuance of a search warrant against an organ of the free press of this country. *A fortiori*, he says, this fact is to be weighed in cases where the premises of the newspaper are not the premises of those persons accused of the crime. I agree with this submission.[393]

346. The situation, as indicated in the passage above, is really a sub-category of the general dilemma regarding searches of unsuspected third parties. It was argued earlier that protection of these parties is appropriate upon execution of a warrant rather than its issuance.[394] However, some jurisprudence has recognized that the journalist plays a role in society that differentiates him from other unsuspected parties.[395] For example, the British test for compelling the use of a journalist's film as evidence in court is higher than a simple "relevance" test. Rather, the film has to "have a direct and important place" in the determination of the issues before the court.[396]

347. Canadian law has been equivocal in its protection of journalists. The most relevant decisions on press privilege have concerned the power of a court to compel a reporter to disclose his sources while testifying in a civil discovery. In *Reid* v. *Telegram Publishing Co. Ltd. and Area*, the Ontario High Court held that the reporter could not be so compelled.[397] In *McConachy* v. *Times Publishers Ltd.*, the British Columbia Court of Appeal held that he could.[398] These cases are only tangentially relevant to the problem involving search and seizure, but it is significant that in *Pacific Press Ltd.*, the British Columbia Supreme Court did not cite the

McConachy case, preferring protective British and American authority on point.

348. It is fair to say that each time a court is presented with an attempt by the State to acquire information from an unco-operative institution of the press, it must balance competing interests of considerable importance. For our part, we would strike that balance by according the press the same protections we have accorded other unsuspected parties. Our Recommendation 38 would oblige the police, at the outset of their search, to request that the specified objects of seizure be produced; only if this request were met with a refusal, or if there were reasonable grounds to believe that the delay entailed in a request would result in the loss or destruction of the objects of seizure, would the police be authorized to execute their warrant in the usual manner. That protection, coupled with the "particular exactitude" which the issuing justices and reviewing courts can be expected to exercise, should provide adequate protection against unreasonable search and seizure for the press and other media of communication.

II. Surreptitious Intrusions

RECOMMENDATION

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

349. The issue of police powers to perform intrusions surreptitiously has been brought into public attention in recent years by a number of disclosures concerning police activities in Canada. These activities have been scrutinized in both the Keable Report, which examined certain incidents involving federal, provincial and municipal police in Québec,[399] and the McDonald Report, which looked into matters concerning the R.C.M.P.[400] Both reports recommended that the Law Reform Commission of Canada address certain key issues respecting police powers.[401] We agree that the

issue of surreptitious searches and seizures in crime-related investigations is a critical one and have approached it in two stages. First, looking at statutory and common law, we perceive that, with one doubtful exception, these activities are not legally authorized at present. Second, after weighing the benefits and dangers of powers to conduct such activities, we conclude that the interests of criminal law enforcement do not justify enacting these powers.

A. The Present Law

350. By surreptitious intrusions we are referring mainly to what police officials frequently call "intelligence probes". The objective of such exercises is to recover information from the place entered without alerting the individual concerned to the investigation. Achieving this objective, as in the case of interception of communications under section 178.1 of the *Criminal Code*, depends in large part on the intrusion itself remaining invisible. However, we also must take into account activities in which the intrusion itself is visible but the police role in it is not. An example of a search and seizure activity of this kind was "Operation Bricole", which was discussed in the Keable Report. An expressed objective of this clandestine police operation was to be "disruptive", by planting suspicion in the organization searched that another organization was responsible for the evident intrusion upon its premises.[402]

351. Police views as to the lawfulness of these activities have themselves varied. The illegality of "Operation Bricole" was conceded in internal police documents.[403] Information presented to the McDonald Commission by the R.C.M.P., on the other hand, indicated that "intelligence probes" have been carried out by a number of divisions on the assumption that they were legally acceptable.[404] At the Commission's hearings, however, the force conceded that at present the law is less than clear.[405] The McDonald Commission's own view was that surreptitious entries were unlawful with the possible exception of searches conducted under narcotics and drugs legislation. Although this view has been challenged in a memorandum issued to the public by the Department of Justice,[406] we generally concur with the McDonald Commission in this regard.

352. The McDonald Commission's reasoning was that, given the trespasses entailed in such entries, the police require a specific

common law or statutory power to perform them lawfully. Our own research indicates that no common law power to enter and make surreptitious observations has been recognized in reported Canadian case-law. In fact, certain remarks of McRuer J. in the *Bell Telephone* case, in which a search warrant to enter premises and observe telephonic communications was invalidated, stand against the existence of such a power:

> As there is no common law authority for what is sought to be done in this case, the authority must be found in the relevant statute.[407]

Proponents of common law powers to perform intelligence probes essentially base their arguments on the possibility that the common law *could* develop in such a way as to accommodate such a power. But this position, while founded on references to expanded police powers in some landmark Canadian and English cases,[408] becomes tenuous in the face of recent Canadian judgments more relevant to the power at issue.

353. Perhaps the most relevant case on point is *Colet*,[409] in which the Supreme Court of Canada ruled that a statutory power to seize firearms did not carry with it a right of entry upon, or search of, private premises. The case does not afford an exact parallel; in *Colet*, the police activity occurring after entry (seizure of firearms) was authorized in the *Criminal Code*, whereas surreptitious observation is not recognized in any federal statute. However, the argument may be put on an *a fortiori* basis: if no implied entry power exists for an activity sanctioned in legislation, how can it exist for an activity *not* sanctioned in legislation?

354. Another analogous problem is that of making surreptitious entries in order to conduct electronic surveillance as permitted under section 178.1 of the *Code*. The absence of any power of entry for such objectives was noted in *Dass*:

> Crown counsel argues that the authority to install carries with it, by implication, the authority to enter premises by force or by stealth in order to implant the device....
> ... I see nothing in the *Criminal Code* which gives a Judge the power to authorize or condone illegal entry. Crown counsel points to s. 178.13(2)(*d*), which appears to enable the Judge to impose terms and conditions which he considers advisable in the public interest. In my view, that provision was not intended as a mechanism to have the Courts authorize illegal acts.[410]

A contrary view was expressed by the United States Supreme Court in the *Dalia* case, in which it was held that it was lawful to perform a

surreptitious entry to install a listening device. The majority of the Court reasoned that such a power of entry was necessary to carry out the purpose of the electronic surveillance legislation at issue.[411]

355. We conclude that no strong basis exists for a common law authority in Canada to make surreptitious entries in order to acquire information. This leaves open the possibility that such authority could be conferred by statute. The only possible sources of statutory authority relevant to the area of crime-related searches and seizures are paragraph 10(1)(*c*) of the *Narcotic Control Act* and paragraph 37(1)(*c*) of the *Food and Drugs Act*, which provide that a peace officer "may ... seize and take away" narcotics or drugs and other relevant objects found in places searched under the relevant regimes.

356. These powers of search (whether with writs, or warrants, or, in the case of non-residential premises, without documentary authority) are worded so as to give the officer apparent discretion to seize certain objects. They may not *require* him to seize them if he finds them. In this respect, these powers serve as an obvious contrast with warrants in Form 5 of the *Criminal Code*, under which an officer is "required" to enter specified premises, search for specified objects and bring them to a justice. The argument that these powers permit surreptitious intrusions essentially boils down to the contention that an officer can enter the place under investigation, attempt to locate evidence of illegal activity, record it or obtain samples and leave without disturbing the status quo. On the other hand, the statutory provisions for both writs of assistance and warrants provide that such instruments are to be issued to "search for narcotics". Accordingly, where the efforts of the peace officer are directed to searching for information about narcotics rather than the narcotics themselves, it could be argued that the practice falls outside the intent of the present provisions. Moreover, the exact relationship between secret searches and existing requirements for announcement prior to entry remains problematical.[412]

357. At any rate, it is apparent that if any power exists to perform a surreptitious entry in narcotics and drugs investigations, it is a relatively limited one. The power requested by the R.C.M.P. is much wider: rather than a search power triggered by "reasonable grounds to believe", discussion has focused on a power to intrude so as to know with certainty whether evidence or contraband is present in a particular premise.[413] Given the expansive nature of this demand and the dispute concerning the scope of activity permissible under existing law, it is important that the matter be clarified. If no power to make surreptitious intelligence probes is justifiable, the

practice should be precluded by legal rules. If it is decided to institute such a power, then it should be carefully and precisely set out in legislation.

B. Should Surreptitious Intrusions Be Authorized?

358. There are actually two questions at issue in the discussion of possible laws to deal with surreptitious intrusions. First, *how could* such intrusions be authorized for criminal investigations? Secondly, *should* such intrusions be authorized for these purposes? We believe that it is important to address the questions in this order, for knowing the nature of the potential authorization procedure helps to put the second question in context.

(1) *Alternative Modes of Authorization*

359. The McDonald Commission did not answer either of these questions directly. However, it did recommend a regime for authorizing surreptitious entries, along with other intrusive operations, in connection with security intelligence. This regime follows a mode of authorization quite similar to that set out in section 178.1 of the *Criminal Code*.[414] Certain remarks in the Report seem to imply that this mode is more suitable for surreptitious entries in criminal investigations than traditional search warrant provisions. Specifically, the Report found that justices of the peace, even those unconnected with the R.C.M.P., would not be qualified to issue the "warrants" that would authorize such entries for security purposes. Accordingly, it was proposed that security intelligence "warrants" be issued by Federal Court judges.[415] Although it is not entirely clear from the proposed regime whether a judge could authorize more than one entry per application, the existence of certain features, such as a 180-day maximum period during which the authorization would remain in force, suggests that the "warrant" could be used for more than one entry.[416] We find this an alarming prospect.

360. Each surreptitious entry entails a distinct intrusion. This differentiates the matter from, say, electronic surveillance, in which the intrusion — access to conversations — is by its nature continuous. Once this distinction is accepted, it becomes difficult to conceive of the need for a power to make a sequence of entries under one authorization document. Such discretion utterly contradicts the

"particularity" features of the conventional search warrant procedure.[417] Indeed, given the manifest character of the "intelligence probe" as a search, the threshold question is why proposals for its authorization must fix on special modes of authorization at all, be they given the "warrant" label or not. We suggest, rather, that the starting point for discussion must be the conventional search warrant procedure.

361. The McDonald Report's preference for a Federal Court judge really begs the question. There is no reason in principle why high-level judges could not be assigned responsibilities in certain cases if departures from conventional warrant procedures were determined to be necessary. But what departures *are* necessary? The McDonald Report includes a number of comments regarding the inappropriateness of search warrants for surreptitious intelligence probes. These comments focus on three limitations perceived to be characteristic of traditional warrant provisions: (1) no offence may be identifiable at the point in time at which the police wish to conduct the entry, (2) search warrants are not obtainable on mere "suspicion", and (3) the procedures are not secret enough.[418] These reasons demand analysis.

362. That no offence may be identifiable at the relevant point in time is a problem cited in the context of security operations and may be confined to that context. The cases cited in the Report in which surreptitious entry might be used in criminal investigation appear to focus on specific offences: drug or narcotics manufacturing and "white collar crimes". We attach considerable importance to the requirement that intrusive criminal investigations be directed to specific offences; this rule flows directly from the principle that makes criminal law enforcement "responsive".[419] No other criminal law power allows intrusion without identification of an offence. In fact, no recommendation in the McDonald Report itself would remove this requirement from any exceptional power granted for purposes of criminal investigation. We cannot accept a departure from search warrant requirements in this respect.

363. With respect to the grounds for authorization, it is indeed a fundamental rule that search warrants cannot be granted on the basis of mere "suspicion". Indeed, it was the fear that warrants would be issued on such a tenuous basis that prompted early common law advocates such as Coke to maintain their opposition to the recognition of warrants. When this opposition was overcome, it was with the assurance that warrants would issue only on "probable cause".[420] This standard has evolved over time into the "reasonable

grounds" test recognized in all Canadian crime-related warrant provisions. It seems fair to say that insofar as crime-related procedures would permit the authorization of searches on the basis of applications that fall below this standard, they would derogate from one of the essential elements in warrant procedure.

364. What is there about intelligence probes, though, that makes compliance with a "reasonable grounds to believe" test impossible? The McDonald Report contains the following observation:

> Surreptitious entry was considered to be justified when the purpose of the entry was to secure information or to confirm that an offence was in the planning stage, or was being or about to be committed, even though a search warrant could not be obtained because there were not reasonable and probable grounds of belief, as required by section 443 of the *Criminal Code*. In addition, on some occasions where a search warrant might well have been obtained, surreptitious entry without warrant was used because the police needed to ensure, before formal entry and seizure under a search warrant, that the activity under surveillance had reached a stage that the evidence found upon the search would be in such a form as to support a successful prosecution.[421]

Of the two types of situations contemplated here, it would seem that the second, in which a warrant "might well" be obtained, presents the distinct possibility of compliance with a "reasonable grounds" test. It is the first, in which confirmation of the occurrence of an offence is required, that represents the more serious departure from the traditional warrant protections.

365. It is to be noted, however, that the warrant envisaged here is that created by section 443 of the *Criminal Code*, which is restricted to the seizure of "things". If, as recommended earlier in this paper, search powers applied with respect to "information", then a warrant might be obtained in this first type of situation.[422] This would depend on whether or not there were indeed "reasonable grounds to believe" that a particular offence had been initiated and that particular information, which would provide evidence with respect to that offence, was present on the premises. Absent such grounds, we again hesitate to authorize any intrusive activity. To permit exploratory entries to ascertain whether such grounds exist is to render protection against unjustified intrusion extremely tenuous.

366. Assuming requirements for a valid search warrant to be met, however, the question arises as to the practicability of using a warrant, given the visibility features associated with it. For one thing,

the availability of application documents is a substantial issue, particularly in the light of the Supreme Court of Canada decision in *MacIntyre*.[423] Secrecy problems also extend to the execution of searches. In this Working Paper, we have made recommendations covering announcement of entry, provision of certain documents to the individual concerned, and allowing the occupant to witness a search of his premises.[424] It is obvious that these rules would have to be modified if surreptitious intrusions were to be effective under a search warrant regime. Although such modifications would severely compromise the degree of protection associated with warrant procedure, they would still leave this mode of procedure a preferable safeguard against undue intrusion to that represented by the surveillance model, if only because the scope of authorized intrusion would remain more limited. The question thus becomes whether such modifications should be introduced into crime-related legislation.

(2) *Conclusion*

367. The claim for exceptional provisions to facilitate surreptitious entries rests largely on police representations that such entries are necessary. The McDonald Report, while refraining from making a recommendation in this respect, observed:

> In a brief to us concerning surreptitious entries the R.C.M.P. has made a strong case that this is a desirable, and often an essential, investigative technique when the manufacture of illicit drugs and alcohol comes under the scrutiny of resourceful investigators. Eventually a time comes when members employed on lengthy, difficult investigations, many involving great personal danger, are faced with the problem of having to know with certainty whether an illicit drug laboratory or still is secreted in a place, if the laboratory or still is producing or is in the development stage, if a cache of drugs or alcohol is in a place, or if quantities of illicit drugs or spirits are being removed from a cache bit by bit for trafficking purposes. The Force considers that it is extremely difficult, without the power to search in circumstances when a search warrant cannot now be obtained, to detect the existence of clandestine drug laboratories. The R.C.M.P. also asserts that surreptitious entry is a valuable tool generally in the fight against "white collar" crime. This latter assertion, however, has not been substantiated before us.[425]

368. It is difficult to evaluate claims about the utility of "intelligence probes", given the present state of empirical data. For understandable reasons, the R.C.M.P. have been reluctant to release information that might endanger the success of some of their investigations. On the other hand, even from publicly presented

submissions, it is apparent that the use of the practice has varied widely from division to division. Indeed, in conjunction with the inquiry of the McDonald Commission, the Force itself had difficulty ascertaining and depicting the extent to which intelligence probes were used in practice.[426] The specific examples cited in the Report often give little indication of the seriousness of the offences involved or the availability of alternative techniques of investigation. In "K" Division in Alberta the technique was reported to have been used predominantly with respect to stolen property offences,[427] which fall outside the drug, alcohol and white collar crime investigations cited by the Force in its arguments for the necessity of the practice.

369. These observations call attention to a serious danger entailed in surreptitious entries: the problems of accountability that develop as the exercise of power loses its visibility. Such a problem has arisen in connection with electronic surveillance under section 178.1 of the *Criminal Code*, which includes reporting provisions expressly enacted to enable Parliamentary review of the interception of communications.[428] Particularly in terms of the figures for convictions obtained, an important set of facts for determining the success or usefulness of the interceptions, Commission research has indicated that the datum produced is essentially meaningless. This condition has been attributed in large part to the time required to process cases, and to ambiguities resulting from matching complex investigative facts to the reporting requirements.[429]

370. Beyond the problems with accountability in this general sense, surreptitious powers thwart accountability for particular actions. Once again, the confidentiality features of electronic surveillance legislation are illustrative. Notification to an individual affected that he has been subjected to electronic surveillance may be delayed for anywhere from ninety days to three years.[430] Even if evidence obtained from the interception is brought to trial, the materials used to obtain authorization are inaccessible except in manifest circumstances of fraud or wilful non-disclosure.[431] The effect of such restrictions is to restrict accountability almost exclusively to the judge authorizing the intrusion and the Crown and police officials supervising it. To permit a trend towards such a condition in search and seizure law would severely compromise a basic characteristic associated with these powers since their introduction three centuries ago: their visibility to the individuals affected.

371. Some of our recommendations in this paper account for modern technological developments such as the use of photographs

and computers that allow the acquisition and storage of information about individuals to become less visible.[432] These developments do not diminish the justifiability of visibility features in search and seizure law. On the contrary, they make it even more critical that the law itself ensure that police powers are exercised in a visible manner. Aside from the possibility of intrusions being undertaken on insufficient grounds, authorization to conduct intelligence probes in criminal investigations heightens the risk of particular intrusions being conducted for purposes outside those ostensibly covered by the enabling legislation. Of particular concern are instances such as Operations "Bricole" and "Ham", two projects carried out by the R.C.M.P. in Québec to obtain information about political activities.[433]

372. The policy considerations outlined above may be augmented by the constitutional issue raised by section 8 of the *Canadian Charter of Rights and Freedoms*, which affords security against "unreasonable search and seizure". Remarks in American case-law indicate surreptitiously conducted searches violate the similarly worded standard contained in the Fourth Amendment. In *Gouled* v. *United States*, a case involving a warrantless entry, the United States Supreme Court observed:

> Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment....[434]

The apparent generality of these remarks, however, must now be considered to be confined by the *Dalia* case. Upholding the power to make covert entries to install an electronic bug, the Court held that such entries "are constitutional in some circumstances, at least if they are made pursuant to a warrant".[435]

373. Whether or not surreptitious searches with warrant might be found to be constitutional by a Canadian court, we conclude that no power to conduct surreptitious entries should be provided in our proposed regime. Recent years have seen the introduction of electronic surveillance legislation in Canada and proposals for mail-opening powers in the conduct of certain crime-related investigations.[436] Like these powers, powers to perform intelligence probes encroach on privacy interests in new ways that make it critical that they be introduced only when convincing proof of their necessity has been made. Absent such proof, we do not recommend the institution of powers to make surreptitious intrusions.

CHAPTER NINE

Special Provisions under Present Law

374. The discussion in Chapter Two outlined the historical background and distinguishing features of crime-related search and seizure provisions under present law. We have incorporated many of these provisions in whole or in part within our previous recommendations. Indeed, our proposed regime completely subsumes present powers of search and seizure following arrest, in cases of consent and under section 443 warrants. There remain, however, many of the special powers directed towards particular problems. In discussing the continuing viability of each special provision, both the individual hallmarks and historical origins become relevant. As far as the former are concerned, it is useful to consider whether the justifications or procedures peculiar to the special provision under present law have been accommodated by the scheme of general rules developed in the previous Chapters. To the extent that accommodation has been made, the special provision is simply redundant. Insofar as the provision would represent a departure from the proposed rules, however, the more substantial question of the justifiability for the departure must be addressed.

I. Writs of Assistance

RECOMMENDATION

43 The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

375. Our recommendation to abolish the writ of assistance is based on an examination of its history, its present use and its juridical character. Because contemporary discussions about retention of the writ often are based on misconceptions about these topics, we put them in their proper perspective in Part One of this paper.[437] We believe that when the issues are examined in the light of our other recommendations, abolition of the writ would reflect both sound analysis and balanced policy.

376. Throughout Part Two of this Working Paper, we have taken the position that non-consensual warrantless entry into privately occupied places to perform searches and seizures should only be authorized when human life or safety is in jeopardy. This position is based on both principled and pragmatic considerations — the individual's strong interest in maintaining the inviolability of his private domain against unjustified intrusions, and the danger that broader exceptions to the warrant requirement in this regard make the requirement itself meaningless. The writ of assistance represents a serious derogation from the procedural norms that characterize the warrant — it is neither granted "judicially" nor with respect to any "particular" intrusion. We believe that these departures cannot be justified by the claims made by defenders of the writ in support of its retention.

377. Our concern is enhanced by the security against unreasonable search and seizure effected by section 8 of the *Canadian Charter of Rights and Freedoms*. It is not irrelevant that the immediate concern prompting the American Fourth Amendment was precisely prohibition of discretionary writ searches to which Americans had been subject as British colonials.[438] Although the "warrant clause" of the Fourth Amendment is not reproduced in section 8 of the *Charter*, it is arguable that the writ may be impugned by the basic standard of "reasonableness" which the Canadian section has incorporated. Due to the impossibility of exercising judicial discretion in granting writs under existing legislation, it could be found that the provisions for their issuance violate the standard of "reasonableness" recognized in the *Charter*. While the power to perform an entry under authority of a writ is circumscribed by a "reasonable grounds" test under the *Narcotic Control Act* and *Food and Drugs Act*, we believe that meaningful compliance with this standard can best be ensured by a judicial officer, adjudicating before the event upon a sworn information. While this position, which

conforms to the American approach, may not be found by Canadian courts to be absolutely required by section 8, we believe that it would give valuable force to the constitutional rule. Moreover, we note that under section 139 of the *Customs Act*[439] and section 72 of the *Excise Act*,[440] reasonable grounds are not a prerequisite to entry.

378. Defenders of the writ of assistance point to the administrative safeguards the R.C.M.P. have built into their operational guidelines regarding use of the writ. In instances of narcotics and drugs these guidelines have required officers to use a writ only in important investigations in which a search warrant could be obtained, but where the immediate search of a dwelling-house was required for the successful conclusion of the case.[441] The *ex post facto* reporting requirements set out in the guidelines are thorough. Indeed we used them as a model for the reports proposed by Recommendation 37 for warrantless seizures.[442] The examples of these reports shown to our researchers in the course of our writ survey portrayed accounts of searches undertaken on grounds of belief that, if sworn before a justice before the intrusion were commenced, would generally have been sufficient to justify issuance of a search warrant.

379. These circumstances still leave a major gap, however, between the administrative guidelines informing writ use and the protections associated with the warrant. For one thing, since the reasons for the search with writ are recounted after the fact, they may be enhanced by information acquired during the search. This possibility derogates from the requirement of "proofs beforehand", which Hale built into the archetypal warrant for stolen goods and which have remained characteristic of warrant procedure ever since.[443] Perhaps more importantly, the guidelines currently used by the R.C.M.P. are merely internal procedures and hence have no legal force. While we do not discount the regulatory value of administrative controls, we believe that the individual is entitled to safeguards with legal status when significant intrusions such as entry upon privately occupied places are at stake. In this regard, it is relevant to note that the internal R.C.M.P. safeguards are at least in part a response to the controversy regarding retention of the writs. This response is a sensitive and commendable one, but it does not offer the fixed protection of the law.

380. In arguing for retention of the writ, officials have indicated a willingness to impose new safeguards on the writ,[444] including investing the issuance procedure with "judicial discretion". This concession may have been offered with the intention of meeting the

objections articulated by Federal Court judges required to issue the writ under existing law. The new features of "judicial discretion" that have been offered, however, have been limited. For example, a set of proposals advanced by the federal Minister of Justice in 1978 would have provided that a judge determine whether issuance of the writ would be "in the best interests of justice" in the area served by the R.C.M.P. officer named in the application, and whether the member had a statutorily prescribed amount of law enforcement experience.[445] Rather than giving a judge the task of case-by-case adjudication characteristic of judicial discretion, these proposals present him with a mandate only to tabulate the officer's years of service and assess local law enforcement needs. While limitations on the duration and area of operation of the writ would differentiate the consequences of issuance from the broader powers lamented in Jackett P.'s judgment in *Re Writs of Assistance*, we wonder whether judges would be persuaded that they had much more discretion to refuse an application under such proposed schemes than under the existing ones.[446]

381. In some part, the arguments in favour of retention fix on assertions as to the effectiveness and careful use of the writ as an enforcement tool. High "hit" ratios have been cited as proof that the writ is not used for "fishing expeditions".[447] Empirical evidence from our writ survey gives qualified support to these contentions.[448] The use of the writ was usually reported to result in seizures, frequently of the specified contraband identified as the original object of search. Such figures, however, tell only a partial story. They do not prove that searches performed with writs would not have been equally effective if another form of authority, such as a warrant or power incidental to arrest, had been used instead.

382. Defenders of the writ point to the peculiar difficulties experienced by narcotic and drug investigators, in particular the frequent need for speedy authorization.[449] Our empirical survey of writ use did reveal that "urgency" factors were the primary reason cited by officers for choosing a writ as the mode of authorization in narcotic and drug searches as opposed to a warrant. However, the patterns of writ use show us that other options such as the use of the power of search incidental to arrest would frequently have sufficed to authorize the intrusions at issue.[450] We perceive that this power, along with those flowing from our search warrant recommendations, afford wide latitude to narcotic and drug investigators.[451] Insofar as the perceived impracticability of warrants may be attributable to the delay inherent in documentary procedures, we believe that the

telephonic warrant procedure proposed in Recommendation 19 offers a sound and practicable alternative.[452]

383. Defenders of the writ also argue that the instrument is necessary to police serious drug offences. Particular reference is made to those involving "trafficking".[453] However, the narcotic and drug searches with writs reported in our survey do not entirely support this argument. In fact, searches appeared slightly more likely to be carried out with respect to simple possession than trafficking offences. While some of the drugs targeted in the possession cases may be viewed as "hard" (e.g., heroin), these figures suggest that the writ is more frequently used to capture the user than the trafficker.[454]

384. Even if powers of search under writs of assistance should ultimately be determined to be constitutionally valid in Canada, we believe that the retention of these instruments cannot be justified. We agree in this respect with the Australian Law Reform Commission, which, referring to writs as "general search warrants", concluded:

> The power to search and seize is undoubtedly a very necessary one for police to have. It has great destructive potential so far as the right to privacy and civil liberties generally are concerned. The power must therefore be capable of justification on every single occasion on which it is used. On this view, the continued existence of general search warrants cannot be countenanced. In the Commission's view such provisions should long ago have disappeared from the Commonwealth and Territorial statute books. We recommend that their demise be delayed no longer.[455]

Similarly, we would urge that the demise of Canadian writs of assistance be delayed no longer.

II. Other Special Powers

RECOMMENDATION

44. The following special provisions should be abolished:

(a) bawdy- and gaming-house powers — section 181 of the *Criminal Code*;

(b) warrants for women in bawdy-houses — section 182 of the *Criminal Code*;

(c) special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;

(d) precious metals warrants — section 353 of the *Criminal Code*;

(e) powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;

(f) powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;

(g) powers to seize counterfeit money — section 420 of the *Criminal Code*;

(h) powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.

A. Gaming- and Bawdy-House Provisions

385. We offer our recommendations to abolish the powers conferred by sections 181, 182 and 183 of the *Criminal Code* at a time when Parliament is considering proposals to repeal the latter two sections.[456] While concurring with the Minister of Justice's proposals in this respect, we cannot anticipate the fate of the present legislation. Accordingly, our discussion addresses all aspects of the special search and seizure powers relating to gaming- and bawdy-houses.

(1) *Sections 181 and 183*

386. There are two essential features that have historically distinguished the search warrant under subsection 181(1) of the *Criminal Code*: the "report in writing" procedure, and the authority to seize and question persons found in the premises searched, pursuant to section 183. Both of these idiosyncrasies represent departures from our proposed recommendations. Together with these special features of the warrant, we examine the special power of warrantless seizure afforded by the present subsection 181(2).

387. The "report in writing" is unique in two respects. First, it is the one warrant procedure that does not require the applicant to present reasonable grounds in his application for the warrant.[457] Second, it is not concluded by swearing an oath. These features, as was outlined earlier, are traceable to the peculiar origins of section 181 as an essentially internal police order procedure.[458] The

identifiably "judicial" safeguard that the applicant satisfy a probative test by sworn evidence was simply not appropriate to the original administrative context of the provision. As has been noted, though, a measure of protection was originally offered in the ancillary requirement that a citizen's complaints under oath be appended to the report. Consequently, it is possible to see that the safeguards on the procedure have indeed been decreased since its origins, despite the recent inclusion of section 181 within the category of expressly labelled "warrant" provisions.

388. What justifies the retention of these exceptional features today? In the course of interviews with police officers from some Canadian forces, Commission researchers were told that speed was essential in obtaining a warrant to search gaming- and bawdy-houses and that reversion to an ordinary procedure of "information upon oath" would unduly impair police efficiency. On the other hand, representatives of other forces perceived that there was little practical difference in the preparation of applications for section 443 and section 181 warrants. In regard to the presentation of reasonable grounds, this latter view appears to respect the ruling in the *Foster* case,[459] which held that if reasonable grounds are not presented on the face of the report, the justice must inquire into them. Indeed, police in Saint John and Edmonton appear, from the samples of the warrants collected during the Commission's survey, to follow a practice of including reasonable grounds on the report form despite the absence of a statutory requirement to do so. The claim that section 443 procedures are too cumbersome for the gaming- and bawdy-house offences listed in section 181 was also contradicted by evidence in the warrant survey that officers in some cities surveyed were more likely to respond to the commission of a gaming- or bawdy-house offence by resorting to section 443 than to the special provision of section 181.[460]

389. Nor does any legitimate justification exist for the retention of the power to seize and question persons found on the premises searched. This power is not really a search or seizure power as such. Rather, it is basically a provision for detention outside arrest and for compulsory submission to interrogation outside traditional restraints upon police powers to enforce private co-operation. The implications of section 183 are obviously quite severe, a fact noted with concern by the Saskatchewan Court of Queen's Bench in *Re Sommerville*. According to this decision, section 183 can only be employed to gain information about two matters — the use of the relevant premises and the execution of the search.[461] Even staying within the bounds of

permissible questions, however, the interrogation gives the police an anomalous power to compel private co-operation. While insisting that resort to this power was rare, police representatives did allude to instances in which it had been used to compel disclosure of the identity of the "keeper" of suspected premises.

390. Nor can we find a persuasive reason to retain the warrantless power of seizure found in subsection 181(2). In fact, representatives from a number of forces interviewed by Commission researchers asserted that the provision is never used; in these forces, administrative policies dictate that a warrant always be obtained. Representatives from other forces, however, maintained that the warrantless power was occasionally useful. Examples of suggested use included instances of stumbling upon an illegal game in progress, finding a game being held in a public place, and situations of urgency. However, the decision of the Supreme Court of Canada in *Rockert* v. *The Queen*[462] seems to have diminished the provision's utility even to those forces which have resorted to it. It was decided in that case that a practice of employing premises is necessary for the place to constitute a "common gaming house" as defined in the *Criminal Code*. Accordingly, the use of subsection 181(2) to respond to initial or transient uses of premises for gaming might well be improper.

391. It might be possible to defend these departures, were the interests at stake in enforcing prohibitions against gaming- and bawdy-houses more critical. On the contrary, however, the validity of the underlying rationales are open to question. The nineteenth-century view of controlling the targeted activities in order to prevent more serious crime is open to question. This Commission has cited laws against unlawful gaming as examples of offences that should be reconsidered in the light of present social attitudes.[463] Even though such activities remain prohibited, it is difficult to maintain that a special search and seizure power should be accorded to enforce them.

392. One concern expressed by representatives of some Canadian police forces was that in the absence of a special warrant provision, the presumption stated in paragraph 180(1)(*a*) might become inoperative. This paragraph reads:

> (*a*) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house; ...

Without discussing the merits of this provision, a topic outside the scope of this paper, it might be commented that the presumption is

not triggered by the existence of a section 181 warrant; rather, it depends solely on the authority of the peace officer to enter the relevant premises. This authority could validly come from any warrant, be it one we have proposed in our recommendations or the present section 443 of the *Criminal Code*.

(2) *Women in Bawdy-Houses*

393. The warrant provision currently defined by section 182 appears to be rarely used. The Commission's survey did not disclose any examples of its issuance. Police officers interviewed in Winnipeg, Toronto, Ottawa, Calgary and Montréal regarded the provision as useless and could not recall an instance in which it had been employed.

394. Any lingering validity this warrant might possess would vanish under the scheme of general rules advanced in this paper. We have recommended that powers of search and rescue be provided for persons unlawfully obtained.[464] To the extent that the presence of an "enticed" or "concealed" woman in a bawdy-house may not be a product of illegal detention, there is simply no valid justification for intrusion under a search and rescue power, much less a search and seizure power. If the police wish to assert control over a woman in circumstances that are not legitimately those of rescue, their power to do so should be viewed in the normal context of such intrusions — that of an arrest. While the original enactment of the warrant for women in bawdy-houses may have been occasioned by a genuine concern for their exploitation, its retention in the present *Criminal Code* cannot be justified.

B. Precious Metals

395. As quaint as the section 353 warrant might appear to be, the basic fact remains that it does nothing more than clutter up the *Criminal Code*.[465] Not surprisingly, no evidence of its use showed up in our survey of warranted searches in cities. If anyone is using this warrant in rural areas, it is a fairly well kept secret. In an attempt to uncover some evidence of its use, our researchers contacted provincial court offices in the Yukon and Northwest Territories. Surveys conducted by these offices failed to turn up a single judge

who could recall issuing such a warrant. The provision was created to deal with frontier mining in the mid-nineteenth century, but both the epoch and the administrative scheme the original warrant enforced have faded away.

396. The provision still applies to the offence of fraud in relation to minerals, as set out in section 352. However, the remaining days of this offence may themselves be numbered. The Law Reform Commission of Canada has proposed a regime of theft and fraud offences that would remove particularized provisions such as the present section 352 from the *Criminal Code*.[466] Even if the substantive offence is retained, the warrant provision serves no useful purpose, even in theory; its subject-matter would be comprehended by our general recommendations as well as existing powers incidental to arrest, and under section 443.

C. Timber

397. Section 299 of the *Criminal Code* appears to be used infrequently at the present time. It is true that training materials for a number of police forces still contain references to this offence.[467] However, the virtually negligible rate of prosecutions under section 299 in recent years strongly suggests that very little resort is made to the search power under that section. Between British Columbia and Québec (two of the major timber producing provinces in Canada), only three charges were recorded in 1978.[468] Moreover, the registration of timber marks — the subject of the special search power — appears itself to be declining. We therefore recommend that this special provision be abolished.

D. Cocks in the Cockpit

398. It similarly appears that the cock-fighting sections of the *Criminal Code* are used very infrequently at the present time. In 1978, the most recent year for which even partial criminal statistics are available, only one prosecution was launched in the reporting provinces of British Columbia and Québec.[469] Whatever utility the provision ever had has probably been superseded by provincial

cruelty to animals legislation.[470] Although some peace officers recounted some interesting anecdotes to Commission researchers about cock-fighting prosecutions, none could recall using the power of seizure. We recommend that the provision found in subsection 403(2) of the *Criminal Code* be abolished.

E. Counterfeit Money

399. Unlike the statutory provisions related to timber and cocks in a cockpit, this power of seizure may be useful to peace officers under present law. There were 226 charges of counterfeiting and currency offences in 1978, a fraction of the percentage of criminal charges laid in Canada in that year, but nonetheless a significant number compared with the even more marginal figures pertaining to cock-fighting and timber offences.[471] We must ask, then, what the special seizure provision in section 420 adds to the proposed powers to seize items possessed in circumstances constituting an offence or comprising evidence of crime.

400. Peace officers have pointed to two situations in which the provision may be useful. First, it permits seizure of tainted money from individuals without a warrant in circumstances in which the individuals themselves are not suspected of involvement in an offence. Without section 420, peace officers could not make a warrantless seizure from a person without either arresting him or obtaining his consent. Second, it permits peace officers lawfully present on suspected business premises to make a quick seizure of counterfeit money found therein even where the money is beyond the control of a suspect and hence not seizable as an incident of arrest. Since the second situation is manifestly covered by the "plain view" rule in Recommendation 30, we turn our attention to the first.

401. It should be noted that in the case of possession of other classifications of contraband, such as house breaking instruments, no warrantless power of seizure is provided by the *Criminal Code*, notwithstanding the fact that existing indicators of the gravity of the offence, such as penalty maxima, are identical to those attending counterfeiting offences. It is possible that even innocent persons, reluctant to part with counterfeit money in their possession without compensation, might thwart efforts to seize it in the delay necessary to obtain a warrant after being confronted with police investigators. In such cases, a peace officer would have to determine whether

warrantless seizure could be justified as an incident of arrest or as within the scope of the "plain view" doctrine.

402. There is a manifestly regulatory aspect to section 420, an apparent tolerance of the special discretion it confers on peace officers in order to protect the integrity of Her Majesty's currency. We recommend that, at least insofar as crime-related legislation is concerned, the seizure of counterfeit money and counterfeiting instruments should be governed by the same principles that govern other items illegally possessed.

F. Narcotics and Drugs

403. Having discussed writs of assistance in conjunction with Recommendation 43, we turn to the other search and seizure powers under the *Narcotic Control Act* and the *Food and Drugs Act*. Although, in terms of the procedural norms we have outlined, these represent exceptional provisions, it is important to realize that they are actually exercised quite frequently. Narcotics and drugs were identified as the object of search in 488 of the 1,825 warrants reported as having been executed in our warrant survey.[472] In the case of personal searches without warrant, they also appear to be frequently sought.[473]

404. The major effect of our recommendation to abolish special search powers for narcotics and drugs would be to require a warrant for all non-consensual entries into privately occupied places, whether residential or not, unless human life or safety was at risk. Although the effect of such a modification in Canadian law may seem drastic, it is important to realize that the warrantless powers currently given to peace officers in this country with respect to narcotics and drugs exceed those available in most of the other countries with a common law tradition.

405. In England, for example, a warrant is required to enter premises to search for unlawfully possessed drugs,[474] a requirement endorsed by the Royal Commission on Criminal Procedure:

> 3.39. We have received little evidence arguing for coercive powers of entry and search before arrest to be available without warrant or other written authorisation. In our view such an intrusion upon the citizen's privacy should always require some form of prior and formal authorisation, whatever the purpose of the search. The existing powers

> are mainly confined to entry and search for items which it is an offence knowingly to possess (we refer to these as prohibited goods) for example stolen goods, drugs, firearms, and explosives.... Warrants for these items should be issued only if it is shown to the issuing authority that there is suspicion based on reasonable grounds that the object of the proposed search is on the premises specified.[475]

An even stronger position obtains in the United States, in which it has been held that, absent narrowly defined exigent circumstances, a warrantless entry into premises to search for contraband is presumptively "unreasonable" and unconstitutional.[476] While the *Criminal Investigation Bill, 1981* currently under consideration in Australia would permit warrantless searches of private premises for objects such as narcotics to prevent their loss or destruction, the Australian Law Reform Commission, in proposing this power, expressed its hope that such intrusions would be legislated judicially "very much along the lines of the American experience".[477] The country with the closest position to that of present Canadian law in this respect is New Zealand, in which police officers may search premises without a warrant for certain classifications of "controlled drugs" including cannabis, cocaine, opium and morphine.[478]

406. If a power to conduct warrantless searches of privately occupied places were considered to be justifiable in narcotics and drugs cases, it would have to be narrowly confined to particularly dangerous narcotics and drugs, and to particular emergencies in which loss or destruction of the objects was imminent. For reasons outlined earlier, we believe that "emergency" criteria are difficult both to define and enforce. While narcotics and drugs offences may be viewed as serious, we find it difficult to justify a departure from the policy against authorizing warrantless entries into private premises solely to avoid dangers of loss or destruction of "objects of seizure".[479] In situations in which obtaining a conventional search warrant is impracticable, our position leaves open the possibility of seizing narcotics incidental to the arrest of a person believed to be in the premises, or of obtaining a telephonic warrant.

407. Certain other provisions are affected by our recommendation. The narcotics and drugs provisions were cited earlier as examples of disharmony between grounds for entering a place and powers of execution once entry has been made.[480] This disharmony undermines the control represented by the warrant, since it leaves the peace officer with wide discretion as to the ambit of intrusion: in particular, as to whom to search and what to seize. The general proposals we have developed avoid such incongruity by allowing the

warrant itself to authorize and define most of the types of intrusion the officer might be called upon to make in the legitimate pursuit of a search or seizure power. For those contingencies that cannot be addressed by the warrant, such as discovery of unanticipated objects of seizure, we attempted to develop fair and balanced approaches. The extension of our recommendations to searches related to narcotics and drugs offences would make some of the incongruous and peculiar powers under existing legislation unnecessary.

408. Consider, for example, the seizure of evidence of an offence. At present, this may not be authorized in a *Narcotic Control Act* and *Food and Drugs Act* warrant, which can only be issued to search for the contraband itself, but it may be effected by the officer in the course of executing the search. It is difficult to discern a legitimate reason for this restriction upon *Narcotic Control Act* and *Food and Drugs Act* warrants. Indeed, its continued existence has made it necessary for officers to make strained allegations of conspiracy in order to invoke *Criminal Code* powers to seize documentary materials in premises, such as telephone company offices, where no contraband is believed to exist. Making the general rules applicable would make this practice unnecessary.

409. The existing *Narcotic Control Act* and *Food and Drugs Act* provision for search of "any person" found in a place searched may be rationalized on the basis of the historical absence of any general power to make such a search in the absence of arrest. Our recommendations, however, allow for personal search only where authorized by warrant or where authorized as an incident of arrest. No convincing reason exists for exempting narcotics or drugs searches from this rule. Indeed, the arguments in favour of the rule have been advanced quite often in discussions of searches for narcotics. The *Ybarra* case, the leading American constitutional decision on point, dealt with a drug raid in a tavern.[481] In Canada, the Pringle Commission, having investigated a similar raid in Fort Erie, Ontario, concluded with the following recommendation:

> Persons found in a place other than a dwelling-house, where there is no reasonable cause to believe that they are in possession of a narcotic or anything incidental to possession of a narcotic by themselves or others, should not be subject to search when the only basis for the search is their legitimate presence in such place.[482]

410. The existing discretion to conduct personal searches for narcotics or drugs raises an apprehension of employing the power against individuals not because of what they are believed to have done, but because of their personal characteristics, membership in

minority groups, or conformity with police profiles of drug users or couriers. These apprehensions arise in conjunction with street searches as well as searches of privately occupied places. We believe that, however important criminal law enforcement objectives may be in a particular case, intrusions should not be performed either on a wholesale basis at selected target groups or, for that matter, at random. The retention of an open power to search invites both the exercise of that power in inappropriate cases and the apprehension that such unjustified use of the power is being made.

411. The major concern on the part of police officials about losing the special power to search persons for narcotics and drugs is that they encounter many circumstances in which, through intuition, they believe a number of members of a group to be in possession of drugs, yet would be reluctant to risk incurring liability by subjecting these intuitions to a "reasonable grounds" test. An example of such circumstances cited by the police is a search of a house in the course of which a number of occupants are found. If the concern were to be persuasive, one would expect the existence of this intuition to be borne out by the fact of frequent seizures of drugs on such persons. Yet the empirical evidence from the Commission's survey indicates the contrary. For example, of 32 seizures of chemicals reported in the warrant survey, only 18.6% were made by virtue of frisks or strip searches of persons. While there were far more reported seizures of marijuana (412), a smaller proportion of these (5.8%) occurred by virtue of person searches. In most cases involving narcotics and drugs seizures, the extent of intrusion made to find them was either a sighting in "clear view" or a search of "drawers, cupboards, closets and files".[483] These figures prompt one to concede the utility of person searches in some cases involving illegal narcotics or drugs. They also suggest, however, that these items are not so frequently found to be concealed on occupants of premises as to justify the present existence of utter discretion to perform such searches. As in the case of all items mentioned in warrants, a person should only be searched for narcotics or drugs when there are reasonable grounds to believe that he is concealing them.

412. Finally, there is the problem of the special powers to use force to break open various compartments and things. These powers, as currently set out in subsection 10(4) of the *Narcotic Control Act* and subsection 37(4) of the *Food and Drugs Act*, were not introduced into narcotic and drug legislation until the 1960-61 amendments.[484] The new scheme introduced by these amendments was also significant for bringing the writ of assistance into the mainstream of search and

seizure provisions in the latter Act. Indeed, the extraordinary powers to use force may be identified quite readily with the writ and traced historically to the exercise of royal prerogative associated with early writ legislation. If this somewhat inappropriate transplant from writ of assistance provisions explains the anomalous power to use force in *Narcotic Control Act* and *Food and Drugs Act* searches, however, there is little basis for arguing for its retention. To make such an argument, in light of Recommendation 20, which incorporates existing standards of "reasonable and probable grounds" and "necessity", is to argue for giving the police the discretion to use force either when such grounds do not exist or at least unnecessarily. Any concern for the special factors presented by *Narcotic Control Act* and *Food and Drugs Act* searches may be met by the concession that section 25 of the *Criminal Code* is flexible enough to take these factors into account.[485]

413. To the degree that the departures from our recommendations respecting searches of places and persons and use of force cannot be justified, we recommend the abolition of the special search and seizure provisions under section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*. If illegal use of narcotics and drugs continues to be dealt with under legislation separate from the *Criminal Code*, then the crime-related search powers outlined in this paper should be incorporated into that legislation. It may be unnecessary to do so expressly, given subsection 27(2) of the *Interpretation Act* and the cases applying this provision to search and seizure law.[486]

G. Obscene Publications, Crime Comics and Hate Propaganda

RECOMMENDATION

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

414. That it is legitimate to seize items to prevent the continuation of an offence was recognized earlier in this paper [487] But the detention and disposition of the things seized are tied, according to the conventional model of criminal procedure, to an accusation and ad-

judication against their possessor. The *in rem* alternative offers a mechanism that allows for an initial intrusion, an adjudication, and a disposition outside the conventional route of the criminal prosecution. It is trite to say that this alternative falls outside the limitations articulated by Dicey in the first principle of the rule of law; it is obviously not a way by which "a distinct breach of the law" is "established in the ordinary legal manner".[488] The question is whether the availability of this alternative may be supported by arguments strong enough to justify its retention.

415. To begin with, the point may be made that since the individual distributor is not charged with an offence, the *in rem* procedure spares him the prospect of a criminal conviction if the publication is indeed found to violate the relevant test. The benefit of this dispensation is augmented by the apparent willingness of the courts to impose traditional criminal law burdens of proof and rules of evidence upon the Crown, despite the reference in subsection 160(2) (obscene publications and crime comics) and subsection 281.3(2) (hate propaganda) of the *Criminal Code* to the individual "showing cause" why the matter seized should not be forfeited.[489] In other words, goes the argument, the individual gains some of the protections of a criminal trial without suffering its major risk.

416. This argument must concede that, notwithstanding the absence of a conviction, considerable prejudice is caused to the publisher or distributor by the *in rem* procedure. In *R.* v. *Pipeline News*, for example, the Edmonton authorities seized and obtained a forfeiture order for 2,580 publications.[490] In fact, the possible prejudice does not merely stem from the forfeiture order; rather, considerable loss may be caused by the detention of the materials pending the final disposition. Although the show-cause hearing is required to proceed within seven days, one must take into account the possibility of delay in a final adjudication. The decision of first instance in *Pipeline News*, for example, was not rendered until a year after the hearing. When the additional possibilities of appeals and applications to quash the warrant are considered, the financial consequences of an unjustified seizure, particularly to periodicals, must be recognized as significant.[491]

417. Consequently, the defence of the *in rem* proceeding must fall back to the position that while the implications of the intrusion may be significant, they are not as potentially harmful as those attending criminal conviction. It might be commented that since the parties named in proceedings related to obscene publications and crime comics are almost invariably corporations, the critical elements of imprisonment and the stigma of a personal criminal record have rarely been a

real possibility in these cases. In any event, however, it is important to recognize that neither section 160 nor section 281.3 of the *Criminal Code* precludes the laying of a criminal charge following a forfeiture, although the former does require the Attorney General's consent to do so. The argument in favour of the *in rem* proceeding on this point is reduced to the proposition that, given a seizure and forfeiture hearing under one of the two sections, the Crown will be content with the disposition of the case and decline to prosecute.

418. Ultimately, the choice of initiating the *in rem* procedure as opposed to the conventional prosecution is a matter of Crown discretion, the difference between the two provisions being that while the launching of a section 281.3 proceeding requires the consent of the Attorney General, the section 160 warrant does not. Although these warrants were not covered by the Commission's warrant survey, some information as to their use is available from previous Commission studies[492] and interviews with police representatives. This evidence suggests that resort to a section 160 warrant is very much a matter of local preference. Most cities did not use it at all, preferring the conventional prosecution, and in those localities in which it was employed, such as Ottawa and Toronto, the authorities favoured conventional prosecutions in most cases. If the *in rem* proceeding offers the distributor or publisher any practical benefits, then, it would appear that these are granted on a discretionary and somewhat idiosyncratic basis.

419. It is difficult to discuss the issue of maintaining these *in rem* proceedings without reflecting upon the content of the two distinct prohibitions which the *in rem* provisions enforce. However, it is important to detach the provisions for the *in rem* proceeding from the subject-matter of the legislation. Indeed, the detachability of these provisions is supported by their histories: the section 160 warrant was introduced into Canadian legislation almost seventy years after the connected offences, and the Special Committee did not itself recommend a warrant for forfeiture before conviction. Whether the substantive offences dealing with the different categories of publications ought to be abolished is a question that obviously must deal with the provisions separately. The propriety of an *in rem* procedure, however, may be examined in a broad context. Assuming that it is desirable to assert control over the relevant types of material, is it legitimate to employ the *in rem* proceeding to do so? We conclude that once the sole purpose of the *in rem* proceeding is recognized as removal of the targeted publications from circulation, the provisions may clearly be identified as nothing more and nothing less than regulatory schemes for the protection of the public. And as such, they do not belong in a code of criminal procedure.

420. The distinction between the enforcement of criminal law and the regulatory control of publications through censorship and restraints upon distribution is often blurred, yet a distinction has been made for constitutional purposes. In *Nova Scotia Board of Censors* v. *McNeil*, the Supreme Court of Canada held that the Amusements Regulation Board established under Nova Scotia legislation could validly ban a film from public viewing. Ritchie J., writing for the majority, stated:

> Under the authority assigned to it by section 91(27), the Parliament of Canada has enacted the *Criminal Code*, a penal statute the end purpose of which is the definition and punishment of crime when it has been proved to have been committed.
>
> On the other hand, the *Theatres and Amusements Act* is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board.
>
> The areas of operation of the two statutes are therefore fundamentally different on dual grounds. In the first place, one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.[493]

421. The *McNeil* case did *not* decide that the federal government could not itself enact a valid regulatory censorship scheme, nor is it intended to impugn the constitutionality of either section 160 or section 281.3 in this paper. What is significant for present purposes about Ritchie J.'s judgment is its restriction of the *Criminal Code* to a "penalizing" function rather than a broader "preventive" one, and its perception of the enforcement of criminal prohibitions against the relevant subject-matter through the prosecution alone.[494] Arguably, therefore, if Parliament wishes to retain a mechanism for preventive searches and seizures of obscene materials, crime comics and hate propaganda, then it should do so in a context other than criminal law and procedure. A number of possible regulatory models from other jurisdictions are available. New Zealand's Indecent Publication Tribunal has been cited by analysts of the present Canadian legislation,[495] although subjected to criticism in New Zealand itself.[496] In the United States, obscene publications are covered by civil forfeiture provisions.[497] It is noteworthy, though, that preventive seizures of offending materials have long been countenanced in a regulatory context here in Canada, under the *Customs Tariff* Act.[498]

422. Whether the intrusion upon liberties represented by seizures of materials before distribution should be authorized by contemporary law, and whether the existing provisions in the *Customs Tariff* Act satisfactorily meet the demands and interests inherent in this task, are questions beyond the scope of this paper. It is suggested, however, that the task, if undertaken, should be recognized for what it is — a preventive, regulatory programme. It should not be confused with, nor dressed up as, a search and seizure power exercised in the enforcement of the criminal law. As currently conceived, sections 160 and 281.3 of the *Criminal Code* should be repealed.

H. Weapons

RECOMMENDATION

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

(a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and

(b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.

423. In Chapter Five, it was recognized that protective search of an individual ought to be allowed as an incident of arrest, as is presently allowed by common law.[499] Other justifications articulated in that Chapter would allow weapons to be seized when they are either evidence of an offence or possessed in circumstances constituting an offence. These justifications basically comprehend the particular rationales for warrantless seizure of weapons which exist under sections 99 and 100 of the present *Criminal Code*, as well as the wide-ranging section 443 warrant. While the section 443 warrant covers only searches of places, however, the proposed set of general rules, like section 99, would cover searches of persons and vehicles as well. Since we provide that such searches could be

performed without warrant whenever human life or safety was in danger, it is unlikely that any search which would be authorized at present under sections 99 or 100 would fail to be authorized under our proposed Recommendations.

424. The same cannot be said of powers under section 101. It was argued earlier that the broadly protective justification present in this section did not belong in an elaboration of general rules, and that by failing to conform to a sequence of crime and response to crime, the provision opens the door to dangers of uncertainty and arbitrariness. Can these dangers be justified where searches for weapons are concerned? In answering this question, we refer to the two concerns addressed in section 101: immediate criminal law enforcement, and long-term regulation of possession of weapons.[500] We conclude that the first concern does not justify additional grounds of intrusion to those recognized in the proposed general rules, and that the second concern, while supportable on principles associated with health and safety legislation outside of criminal law, does not justify the provisions of section 101 as currently worded.

425. The first concern is basically an application of the preventive policing approach to the problem of dangerous possession of weapons. The need for preventive powers in this regard has been articulated in contexts as diverse as legal publications[501] and police submissions to Parliamentary Committees.[502] Quite simply, proponents of such powers argue for the legitimacy of intervention where a firearm "is about to be used illegally". What this argument passes over, however, is the fact that the prospective use of a firearm for an illegal purpose is itself covered by offence provisions. The *Criminal Code* includes prohibitions against concealment, careless use, pointing a firearm, possession at public meetings, and possession for dangerous or illegal purposes.[503] Particularly in this last case, the law reflects a concern for the safety of members of society by curbing what is essentially inchoate criminal activity. And in addition to the restrictions on use, there are provisions against illegal possession of weapons that fall into restricted and prohibited categories.[504] A reasonable belief on the part of a peace officer that an individual possessed a weapon in contravention of these laws would provide a sound basis for invoking authority to search for and seize the weapon.

426. The issue, then, is a rather precise one. What "safety" factors, outside of the illegality of a weapon possessed, its subjection to careless use or handling, the unlawful or dangerous purpose of its possession, or the fact of arrest, might present valid grounds upon

which an officer should be authorized to conduct a search for, or seizure of, a weapon? This question is probably best answered by reference to the uses to which section 101 may be put.

427. The *First Progress Report* on the evaluation of gun control legislation prepared for the Solicitor General confirmed that it is mainly the warrantless power under subsection 101(2) rather than the warrant power under subsection 101(1) that is put to use. The Report continued:

> The predominant characteristics of the situations which have given rise to both s. 101(1) and s. 101(2) searches has been that the individuals involved, although not "criminals" *per se*, are exhibiting emotional instability or violence in circumstances or surroundings where firearms are easily accessible. So, search and seizure in the interests of safety most often arises in domestic or neighbourhood disputes. ... We have found one or two jurisdictions where s. 101(2) has been employed to facilitate searches of known or suspected "criminals". These searches may not be in technical contravention of the section. But, if the proposition that both ss. 101(1) and (2) were intended for use in "behavioural" rather than "criminal" situations is correct, then such searches can be viewed as an abuse of the intent of the section.[505]

428. The Report, then, distinguishes between the type of safety factors presented by an individual's behaviour and the type presented by his status in the eyes of the police, suggesting that it is upon the former that the legislation is properly focused. Leaving aside for the moment the question of the section's possible tolerance of searches based on status, it is worth inquiring whether in fact the former type of safety factors do present a valid justification for search. Why should behaviour that does not constitute a criminal offence leave the individual vulnerable to intrusion by the police? This paper has tendered a responsive view of the criminal law, and has rejected the proposition that the interests of criminal law enforcement require the conferment of powers to make intrusions of a purely preventive nature.[506] Is such a general view inappropriate in the context of firearms searches?

429. We suggest that to regard the issue as one of preventing crime or not preventing crime may be misleading, for the concern with the prospective use of firearms by emotionally unstable persons does not stop at the prevention of *crime*. Rather it extends to the prevention of *injury*, whether or not the commission of a *crime* is entailed. Once this is appreciated, it is apparent that the justification for special search and seizure powers for firearms resides not in criminal law enforcement, but rather in the second aspect of section

101: comprehensive regulation of the possession of weapons. This concern, in a sense the more sweeping of the two in scope, is founded on the comparatively modern principles of public health and safety legislation rather than the traditional objectives of criminal law. Indeed, the growth of gun control legislation over the past one hundred years has been characterized by the expansion of laws from prohibitions against criminal conduct to include regulatory features such as permits and registration, and recording procedures.[507] While the latter have been embraced in the *Criminal Code* itself, it is important to recognize that they are not in truth "criminal law"; they do not in themselves denounce or prohibit actions, condemn those who commit them, or penalize offenders. Rather, much as explosives are covered by the *Explosives Act*,[508] the acquisition, possession and use of weapons are subjected to regulation in the interests of public safety. And while these interests often coincide with the enforcement of criminal law, this is not necessarily the case.

430. Perhaps the best example of a weapons seizure conducted on a health and safety basis occurred in *Re Thomson*, a case that involved a large cache of explosives and weapons.[509] While some of the explosives and weapons were possessed illegally, many of them were not. In finding that grounds existed for the seizure, Phillips Prov. Ct. J. focused not on specific instances of illegality, but on general factors to do with the occurrence of a fire in the neighbourhood and the susceptibility of the weapons to theft as a result of media coverage of the existence of the cache.[510]

431. One's perception of the acceptability of the present section 101 as an instrument of gun control depends in some part upon one's perception of the acceptability of regulatory gun control legislation in general. That a "gun is a dangerous object", the assertion underlying the 1977 amendments, is not questioned here; nor is the basic regulatory scheme set up as a result of those amendments. Whether or not this scheme truly belongs in the *Criminal Code* is a fair question. For constitutional purposes, it has been determined by the Alberta Court of Appeal that section 101 is valid federal legislation under the Criminal Law power in subsection 91(27) of the *Constitution Act, 1867*.[511] It might be observed that the regulatory aspects of gun legislation, like those of explosives legislation, might easily be placed in another statute, but recommendations in this respect are beyond the scope of this paper; unlike obscene publications and hate propaganda, the relevant provisions cover far more than *in rem* procedures.

432. If one accepts the "regulatory" aims and provisions of gun control legislation, one must still question whether the present search and seizure provisions in section 101 are appropriate. Insofar as regulatory searches involve a different set of premises than those underlying search and seizure powers to enforce criminal law, the matter may deserve attention in another study. The following preliminary comments are directed specifically to ensuring that these regulatory powers are not distorted into a general mandate to conduct the discretionary searches of suspected criminals, noted and criticized in the *Progress Report* prepared for the Solicitor General.

433. It is important to note that some police materials instruct peace officers to use their power with circumspection. The Metropolitan Toronto Training Précis comments that "this legislation will be very helpful to police officers in emergency situations where members of the public are in danger and there is no time to obtain a warrant". It goes on to warn, "extreme care must be taken by all officers to ensure that this power is not abused".[512] It is also true that some police forces appear to be taking a cautious view of their powers under section 101, instructing officers that the section is applicable to searches of places rather than persons. On the other hand, other forces consulted by the Commission defended retention of the provision on the basis of the need to conduct personal search activities.[513] At the least, the situation with respect to searches of persons under section 101 ought to be clarified. The larger issue, however, remains: how the ambit of the section may be restricted so that it is confined to its legitimate purposes. In this regard, two suggestions are offered.

434. First, the power to search and seize should be linked more closely to the *in rem* application. As in the case of obscene publications and hate propaganda, it is the *in rem* hearing that represents the essential, long-term regulatory decision: whether the relevant items should be allowed to remain in the private individual's possession. Search and seizure powers, according to the *in rem* models established under sections 160 and 281.3, should be regarded as ancillary provisions designed to bring the item under state control pending the adjudication of the matter. Accordingly, it should be made clear that the prohibition against possession justified in the "interests of safety" is the long-term deprivation contemplated by an order under subsection 101(6) and not simply the brief interference that may result from an officer's actions. It is noteworthy that while the Attorney General must make a return to a magistrate, this in itself does not start the *in rem* procedure. To do so, another application to

the magistrate must be made under subsection 101(4); in the absence of such an application within thirty days, the articles seized must be returned. This disjunction permits the police to set up a parallel system of regulation: to make seizures, detain the items temporarily, and return them to the owner without invoking the essential regulatory mechanism of the *in rem* proceeding. The disjunction should be corrected and the search for, and seizure of, items linked directly to the *in rem* hearing, as is the case under sections 160 and 281.3.

435. Second, the grounds for search and seizure should incorporate a reasonable belief that the person concerned is actually in possession, custody or control of a weapon. This belief was implicit in the wording of the former section 105, which allowed seizure of weapons but not searches for them. While it would seem justifiable to enable a peace officer to search for a weapon possessed in dangerous circumstances, it would appear unnecessary to go so far as to sanction a "fishing expedition". To leave the person susceptible to search so long as it is perceived that he ought not to have a weapon, is to sanction a form of inspection inappropriate to an *in rem* procedure. While the *in rem* proceeding is inherently regulatory in nature, it possesses many features analogous to the "rule of law" protections built into criminal law. For example, it makes deprivation of the individual contingent upon an adjudication that the relevant possessions fall within the designated class. Under sections 160 and 281.3, the responsiveness of the procedure extends to the search and seizure stage. A peace officer is not entitled to perform inspections to ascertain whether an individual is in possession of the designated items, but to search only if there are reasonable grounds to believe that he in fact possesses them. It is not clear why any legitimate searches performed in the interests of gun regulation cannot be authorized within similar constrictions.

I. Entry to Prevent Danger to Life

436. Many of the recommendations in this Working Paper have related to aspects of search and seizure powers directed to the preservation of human life and safety.[514] As indicated earlier, however,[515] the responsibilities of a police officer as "keeper of the peace" expand beyond search and seizure activities. Insofar as we are concerned here exclusively with powers of search and seizure, we make no recommendation concerning the retention or modification of this historical role.

CHAPTER TEN

Enforcing the Rules

I. Introduction

RECOMMENDATIONS

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.

437. Enforcement of the legal rules governing search and seizure encompasses both "internal" and "external" enforcement mechanisms. "Internal" mechanisms enforce the rules by instilling awareness of, and obedience to, legal procedures through institutions and structures associated with the police and the issuers themselves. It is somewhat trite to observe that to the extent that an internal system can accomplish these objectives, it possesses advantages over resort to "external" mechanisms: bolstering morale and cohesiveness among the officials involved, and even more importantly, working to prevent procedural violations rather than addressing them after the fact.[516]

438. Examples of internal controls such as training courses for police and justices of the peace have been noted and lauded in the

course of this paper.[517] Even initiatives so basic as the updating of forms in the wake of relevant case-law represent a form of internal control, a step taken to ensure that future activities stay within the law as redefined. Indications that some of the forces and court offices are upgrading control of their practices are encouraging. The high incidence of illegality demonstrated by the Commission studies, however, shows more than a need to tighten up internal enforcement. It raises the question: What is and should be done when internal enforcement fails? It is this question, the question of external controls, to which the following discussion is directed.

439. Theoretically, an individual whose person, vehicle or premises have been searched by a peace officer has three alternative ways in which to challenge the legality of the search or seizure.[518] First, if objects have been seized, he can apply to a court to deny the police the right to retain them or use them for investigative or evidentiary purposes. Second, he can initiate criminal or disciplinary proceedings against the issuer or executor of the warrant. Finally, he can seek to recover damages for the intrusion through civil proceedings. Until recent constitutional developments, however, the legal and practical limitations on these alternative courses have been such that they have fallen short of providing significant vindication or protection of individual interests against intrusion by the police.

440. Certain aspects of this situation, may well be changed by virtue of section 24 of the *Canadian Charter of Rights and Freedoms*:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

While the exact scope and meaning of the provisions of this section must await judicial determination, there are a number of clear limitations in it that are relevant to our analysis.

441. It is apparent that the section does not purport to cover enforcement of all rules governing search and seizure powers. Rather it is triggered specifically by a violation of constitutionally guaranteed rights and freedoms. In the case of search and seizure powers, this

means the constitutional standard of "reasonableness" set out in section 8 of the *Charter*.[519] Nor does it comprehend all possible enforcement mechanisms. In that section 24 contemplates an application to a court of competent jurisdiction, it does not seem to cover internal disciplinary procedures or conventional criminal prosecutions against the violators of those rights. And insofar as it focuses on the violation of individual rights, the section does not relate at all to wider regulatory mechanisms of enforcement.

442. Accordingly, the following observations are not structured exclusively around section 24 of the *Charter*. Rather, we approach the subject in three parts: (1) traditional ways of challenging a search or seizure through civil, criminal and complaint procedures, (2) proceedings relevant to the exclusionary principle and restoration of things seized, and (3) regulatory monitoring.

II. Traditional Alternatives

443. The primary alternatives traditionally available to a person aggrieved by a search or seizure are criminal, civil and complaint proceedings. (Although prerogative writs are also traditional, we consider them in the next section in conjunction with the exclusionary and restoration issues to which they in some part relate.) The problems relating to criminal, civil and complaint proceedings against officers involved in criminal law enforcement are not peculiar to search and seizure. Allegations of violence, in the course of incidents of arrest and custodial interrogation in particular, have attracted recent attention.[520] We do not undertake in this paper to provide solutions to these problems, partly because they go beyond the scope of this Working Paper, but also because we doubt whether any solutions to those problems would be likely remedies for some of the more prevalent problems relating to search and seizure. Accordingly, we discuss the traditional remedies mainly to show why other enforcement mechanisms are desirable.

A. Criminal Prosecutions

444. These procedures are mainly relevant to allegations against the police. The only provision that might be used to prosecute

a justice issuing an illegal search warrant would appear to be section 115 of the *Criminal Code*:

> Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

This section was utilized in the case of *R.* v. *Coutellier, Cobb and Cormier* to prosecute police officers for an illegal search without warrant,[521] and it might be applicable to the wilful disobedience of a requirement pertaining to the issuance of a search warrant.

445. The range of offences with which a police officer might conceivably be charged in connection with an illegal search or seizure activity is less limited. In addition to assault and bodily harm sections which would apply to improper uses of force, there are a number of *Criminal Code* offences against the administration of law and justice which could be relevant to the conduct of a peace officer. These include section 120 (perjury in judicial proceedings), section 122 (false statements under oath), and section 117 (misconduct in the execution of process and making false returns). Since all of these offences are indictable, however, a practical limitation is placed upon the individual aggrieved: the Crown has an absolute right to intervene in the prosecution and conduct of all indictable offences.

446. It has been suggested that prosecutions of police officers are impeded by both the natural human tendency to close ranks with one's colleagues and by the possibility that illegal conduct may be consistent with normal departmental practice.[522] In fact, criminal proceedings are rarely resorted to against police officers in connection with searches with warrant. In 1973, Spiotto noted that criminal prosecution, while theoretically available, had not been invoked in Ontario in connection with illegal searches and seizures since the early 1940s.[523] This conforms with recent national information received by the Commission relating to the R.C.M.P. In 1978 and 1979, a total of five prosecutions were launched against R.C.M.P. members for assaults related to search incidents, but none of these involved a search warrant. In all five cases, the officer was acquitted. While this may be a reflection upon the merits of the charges laid, it may also indicate the difficulty in obtaining a conviction against a peace officer.[524] And even when a conviction is obtained in a search-related charge, the sentence is likely to be a light one. In the *Ella Paint* case, the appellate court recommended a "nominal" penalty.[525] In *Coutellier, Cobb and Cormier*, officers who

had conducted an illegal search without warrant were given absolute discharges.[526]

B. Complaint Procedures

447. Short of initiating a criminal charge against the peace officer, an individual may present his grievance to the police authorities themselves by lodging a complaint. This step may lead to remedial action being taken by supervisory personnel or to the initiation of disciplinary proceedings.[527] Yet as a response to intensive search and seizure, relatively few complaints appear to be made, at least in the case of the R.C.M.P. During the course of a six-month study conducted by the force in 1979, 26 complaints were received regarding search. Statistics for seizures were smaller: 18 complaints were made. In those cases in which it was deemed appropriate to take action, the consequences were the most informal possible — in seven search cases and one seizure case, the officer was "counselled".[528] Similar indications of the infrequency of complaints related to search and seizure were reported by Spiotto in 1973, with particular reference to Toronto.[529]

448. The Marin Report, issued in 1976, recognized that not all individuals who feel aggrieved by R.C.M.P. action take the step of making a complaint, and identified four particular reasons for such failures:

- the individual concerned did not know how to bring the complaint to the attention of the Force;
- he felt that to complain would "do no good" as the Force would simply "cover up";
- he feared that some form of retaliation by the Force would follow the lodging of a complaint;
- upon seeking the advice of others, he was discouraged from pursuing the complaint further.[530]

While it is dangerous to generalize from observations made about one particular police force, observers suggest that the concerns expressed in the Marin Report are applicable to other forces.[531]

C. Civil Proceedings

449. While the common law has regarded public officials as being liable to persons injured by their unlawful acts, it has taken

account of the difficulties facing judicial decision-makers. For example, in *Cave* v. *Mountain*, the Court distinguished between the absence of jurisdiction, which could lead to liability, and an error of judgment, which could not.[532] Today, the common law position has become complicated by statutory provisions at both the federal and provincial levels.

450. The first federal provision brought into play is section 717 of the *Criminal Code*, which becomes relevant on an application to quash a search warrant:

> Where an application is made to quash a conviction, order or other proceeding made or held by ... a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice ... or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.

The wording of the section is permissive, and confers a discretion upon the court. Nonetheless, recent decisions would indicate that the order is granted almost automatically upon the invalidation of a search warrant; indeed, the expression "usual order" has even been used.[533] Perhaps the most surprising instance of such an order occurred in the *Den Hoy Gin* case, in which it was found that the police officer concerned had sworn a false information. Nonetheless, the usual order for protection was made.[534] On the other hand, in *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, the British Columbia Supreme Court refused to grant protection to the police officer executing the search, reasoning that an order should be made only where material before the Court shows neither any suggestion of bad faith nor ulterior motive on the part of the police nor any impropriety in the execution of the seizure.[535]

451. Quite aside from the protection afforded by section 717, the liability of an officer executing a warrant is circumscribed by subsection 25(2), which reads:

> Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

The good faith tests inherent in the two provisions are virtually identical; the difference between the sections is found in the context

of their application. While section 717 may only be invoked on a pre-trial application, subsection 25(2) may be raised in the civil proceedings themselves. Neither provision, however, would appear to protect the officer against liability arising from acts not authorized on the face of the warrant.

452. The justice of the peace, as well as the peace officer, are provincially appointed officials. Accordingly, the provincial legislatures have taken their own steps to enact protective rules. There has been a certain difference in approach with reference to the common law position. A number of provinces have maintained the distinction between judicial errors committed within the decision-maker's jurisdiction, and errors that themselves are pertinent to the question of jurisdiction.[536] Other provinces have given blanket protection to their justices, provided that their powers of decision are exercised in good faith.[537]

453. An argument may be made that the alternative of civil proceedings offers a certain balance as a means of enforcing rules of police conduct. Tort law, runs the argument, "confers on private individuals the competence to decide whether they have been hurt enough by some such abuse to make them want to undertake the trouble and expense of inflicting a necessary penalty on the defendant".[538] The problem with this argument is that the institutional restrictions upon inflicting this penalty are so formidable as to discourage all but the most intent of private individuals. Aside from the statutory hurdles and the costs of litigation, both of which can be formidable, there is the problem of quantifying damages. When the intrusion has caused considerable deprivation of privacy and dignity, but little obvious physical or economic injury, the individual faces formidable obstacles in obtaining a sizeable judgment. This may be particularly true when the individual is from an economic or social group associated in a jury's eyes with criminality.[539]

454. Once again R.C.M.P. statistics show infrequent use of the available civil remedies. In the years 1978 and 1979, six civil claims were initiated in connection with searches with warrant; another six claims were launched with respect to other searches.[540] The claims included allegations of the warrant's invalidity, improper execution, and violation of solicitor-client privilege. These statistics do not include the more frequent claims for damages arising out of legal searches, such as payment for doors lawfully knocked down in the course of narcotics or drugs searches. Since legality is not in issue in such claims (and indeed payment is understood to be made on an *ex gratia* basis), they cannot be considered to reflect the use of civil

proceedings to enforce the rules attending searches and seizures. Indeed, the greater frequency of claims for physical damages than for wrongful intrusions tends to prove the point that tortious remedies are more appropriate for physical and economic injuries than less concrete ones. Once again, the Commission's findings confirm earlier research by Spiotto, who concluded that "where the illegal conduct involved is an illegal search and seizure, very few [tort] actions appear to have been brought".[541]

D. The Need for Alternatives

455. That resort is rarely made to criminal, civil or complaint proceedings in order to challenge the legality of search and seizure laws is hardly a controversial proposition; police and Crown counsel admitted as much to Spiotto in the course of his studies in the early 1970s.[542] An explanation frequently offered for this circumstance has been that, due to high training standards among law enforcement personnel (*viz.* the effectiveness of internal enforcement), there are, in fact, few incidents of illegality.[543] In the light of evidence that the rules are not being followed, however, we suggest that the true explanation for the absence of challenges is less reassuring: no effective mechanism for remedying the relevant violations has been available under Canadian law.

456. Part of the problem may lie in obstructive aspects of the procedures traditionally available. There is no doubt that a great deal of improvement could be made to criminal, civil and complaint procedures to make them more accessible to the individual aggrieved. In civil proceedings, for example, full solicitor-client costs could be awarded to private litigants and minimum figures set for damage awards for illegal uses of police powers.[544] So too, the section 717 protection order, which is granted virtually as a matter of course, could be more vigorously opposed by counsel in cases in which a warrant is quashed. This would remove an existing obstacle to

subsequent action against the participants in the warrant process. Enhanced procedures to ensure the objectivity and thoroughness of prosecutions of police officers might allay perceptions of the ineffectiveness of criminal charges as an enforcement mechanism. But would such improvements really address the problem at the root of the present crisis?

457. That these remedies are not used to enforce the rules governing search and seizure may have less to do with the remedies themselves than with the way these rules are breached. The kind of illegality disclosed by the Commission's studies would rarely be a blatant manifestation of abuse. Peace officers conducting an organized search under a defective warrant or professionally frisking an individual whom they have no statutory authority to search may not be performing acts that create serious economic or physical damage. In the absence of such damage, an individual whose person or premises are searched may not even know that the police have done anything wrong. Canadians, as commentators have noted, tend to accord legitimacy to the actions of authority figures such as peace officers.[545] When the basis of illegality resides solely in a statutory distinction or evaluation of a document, the individual is in effect spared the obvious visible abuse that might provoke a challenge to the intrusion.

458. It may be argued that the less traumatic illegalities in the warrant process neither cause the injuries nor deserve the kind of censure associated with violent abuses of individual rights. However, this does not excuse or justify the evident laxity in enforcement of the procedural rules that exists today. Indeed, it is the focus of the present remedies on blameworthiness and individual loss that is at the heart of the problem of enforcement. For the damage done by prevalent procedural illegality is not simply the individuated kind that may be met by tort and criminal actions. Rather it also relates to values at the same time more abstract and more pervasive — the values inherent in the rule of law which underlies our criminal law enforcement system.

459. If it be accepted that it is important to breathe some life back into the model of a criminal law enforcement system bound by rules that authorize intrusions upon individual rights, it is necessary to look to alternatives outside the traditional remedies. One is to institute an effective procedure to implement the exclusionary principle set out in section 24 of the *Charter*. Another is to establish regulatory mechanisms to monitor and encourage police compliance with the rules.

III. The Exclusionary Principle and Restoration of Things Seized

A. Before the *Charter*

460. Before the enactment of the *Canadian Charter of Rights and Freedoms*, prerogative remedies and common law rules of evidence provided the grounds upon which a person affected by a seizure could seek to influence the disposition of things seized. These means, however, were quite limited. According to the Supreme Court of Canada decision in *Wray*, relevant evidence that had been improperly or illegally obtained could only be excluded if it were gravely prejudicial to the accused, of tenuous admissibility and of trifling probative value.[546] Although an application for prerogative relief has long been established as a means of challenging a seizure with warrant, the capacity to use this alternative to affect the disposition of things seized has not been clearly defined. In order to appreciate this latter alternative's usefulness for this purpose it is worthwhile to briefly canvass the pre-*Charter* law on point.

461. In the *Kehr* case, it was held that the issuance of a search warrant, being of a judicial character, could be reviewed by a superior court in *certiorari* proceedings.[547] These proceedings have generally been simplified over the past seventy years, and the application today may simply be styled "an application to quash", but the powers and role of the reviewing court have remained essentially the same. Basically, superior courts have justified their intervention in the issuance process on three grounds: that the information failed to give the justice of the peace jurisdiction to issue the search warrant; that the justice failed to exercise his discretion judicially; and that the search warrant issued failed to comply with legal requirements. In effect, these grounds have enabled reviewing courts to quash warrants for all but the most trivial formal defects.

462. A critical question which has remained unresolved in Canadian law, however, is that of the reviewing court's discretion regarding disposition of the items seized under a warrant found to be unlawful. While the *Bergeron* case[548] established that a superior court may order the return of such items to their owner as an incident of its power to quash, the decision specifically refrained from deciding whether an order could ever be made that would allow the Crown to

retain items it required for evidentiary purposes, despite the quashing of the warrant authorizing their seizure. Such an order was made in *Black*,[549] a case that the Supreme Court of Canada distinguished in *Bergeron*. A principled stand against the *Black* decision has been taken in *Alder*, Moshansky J. stating that "to allow the police to retain articles illegally seized under a defective search warrant which has itself been quashed strikes me as a mockery of the law".[550] On the other hand, numerous courts have made orders similar to that in *Black* since the *Bergeron* case, and the Supreme Court itself has recently declined to consider the matter anew.[551]

463. Until recently, Canadian search and seizure law had focused primarily on the application to quash as the mechanism by which the detention of illegally seized items could be challenged. The result was a state of discrimination in favour of instances in which an item had been seized with warrant and, within this context, in which the illegality pertained to the issuance rather than the execution of the document. This focus, however, has been broadened in two recent cases from British Columbia: *Capostinsky* and *Butler*.

464. In *Capostinsky*,[552] the plaintiff applied by way of replevin proceedings for the return of blood samples taken from him by a doctor without his consent and later seized by the police pursuant to a search warrant. Berger J. held that the warrant was a nullity, since it described no offence known to law, and ordered the return of the sample on alternative bases: as a matter of inherent jurisdiction in quashing the warrant, or an application of the remedy of replevin. The implication of this view, that a court could order restoration of items illegally seized when no warrant was involved, was picked up in *Butler*,[553] in which the British Columbia Supreme Court, exercising its inherent jurisdiction, ordered the return of personal items seized from the petitioners pursuant to their arrest.

465. In addition to the above-noted applications, there currently exist a number of statutory procedures under which individuals may regain items seized from them by the police: subsections 101(4), 160(2), 281.3(2) and 446(1) of the *Criminal Code*, subsection 10(5) of the *Narcotic Control Act* and subsection 37(5) of the *Food and Drugs Act*. Since these proceedings expressly consider the validity of continued *detention* of the items seized rather than the legality of their *seizure*, however, they cannot be regarded as enforcement mechanisms governing the exercise of police powers. These proceedings will be addressed in detail in the Working Paper on Post-Seizure Procedures, which concerns the procedures for determining the admissibility of things illegally seized, as well as

those necessary to ensure the restoration of takings, the preservation of evidence and the forfeiture of contraband.

466. A limitation of the available procedures has been that a successful application has not prevented the police from subsequently making a seizure of the same objects under newly acquired authority. In the course of discussions, both Crown counsel and defence lawyers offered a number of reasons why resort might be made to this option. These included using a successful application to pressure the Crown into plea bargaining, obtaining a preliminary decision on the question of legality before launching a civil suit, using the finding of legality to fight extradition to the United States, and embarrassing police witnesses at jury trials with the fact that their evidence had been gained at least in part through means determined to be illegal.

467. There was little enthusiasm for the prospect that the application could effectively accomplish what it might appear to have been designed for: nullifying the action taken illegally under it. Such a prospect has in effect been dimmed by decisions such as *Black*.[554] Indeed, the Crown has even on occasion gone so far as to concede the illegality of warrants before the reviewing court and simply filed materials to support its contention that the seized items have evidentiary significance. While such a position has reflected a certain realism and judiciousness on the part of Crown counsel in evaluating warrant documents, it has robbed the quashing application of its supervisory function, making it in essence a superior court inquiry into the questions of necessity which are specifically addressed in restoration procedures. This circumstance may change significantly, however, in the light of the enactment of section 24 of the *Charter*.

B. The *Charter* and Disposition of Things Seized

468. The impact of section 24 of the *Charter* upon the restoration of things seized and evidentiary rules of admissibility is a matter which Canadian courts are just beginning to address. It is clear that no remedy will lie under this section unless there has been a violation of the applicant's constitutional rights. If this requirement is met, subsection 24(1) allows for a court of competent jurisdiction to dispense an appropriate and just remedy, which in proper cases could include an order to restore a thing unconstitutionally seized.

Subsection 24(2) specifically empowers the court to exclude evidence if the administration of justice would be brought into disrepute by its admission. Although the circumstances in which these provisions will be triggered remain, for the present, a matter of uncertainty, the Commission believes that it would be timely to suggest procedures for challenging the legality of seizures, the detention of things seized, and the admissibility of evidence seized. As we take the view that these matters all pertain to the disposition of things seized, we shall defer our recommendations in this regard until the publication of our Working Paper on Post-Seizure Procedures.

IV. A Monitoring Panel

469. A balanced exclusionary rule could accomplish much towards the achievement of a law enforcement system bound by the rules that define its legal powers. Yet, however valuable it may be in "normative" terms, such a rule may not in itself be effective in ensuring actual widespread compliance with these rules. This is because an exclusion order is essentially conceived as a remedy granted in response to an individual incident of wrongdoing; like other remedies, it depends on both the initiative of an aggrieved individual to apply for it, and the willingness of a court to grant it. Whatever regulatory effect the rule has been accorded has been based on the perception that the possibility of exclusion of evidence acts as a deterrent on illegal police conduct. This perception is on the wane, however. While the American exclusionary rule, for example, was once promoted as a deterrent,[555] both recent case-law[556] and empirical studies[557] have disputed its significance as a deterrent. Moreover, insofar as the problems of non-compliance with legal standards are attributable to warrant issuers, the notion of a deterrent effect is simply inapplicable: the issuer has no apparent stake in the outcome of the police investigation and prosecution. To speak of enforcing the rules of search and seizure through external controls, therefore, entails looking at mechanisms other than an exclusionary rule.

470. It is necessary, in fact, to go beyond variations on remedies to be dispensed in deserving cases and look at the questions of controls in wider, regulatory terms. For the problem of illegality is more than

simply the sum of those individual conflicts brought before the courts. Rather, it may involve patterns of practice within police and judicial organizations as a whole. Such patterns of practice were evident in the results of the Commission's warrant survey: the detailed elements on Vancouver documents, for example, as opposed to the terse presentation on those from Montréal. In order to address these patterns, it is important to consider ways in which the practices of organizations as a whole can be addressed.

471. It is widely accepted that the most effective external controls upon the police are those that reinforce internal mechanisms. As one commentator has observed:

> [E]xternal controls should be designed in a manner that reinforces the internal systems of discipline upon which primary dependence continues to be placed. They should be oriented not towards the control of individual misconduct, but rather should be directed at a review of the conditions that make such misconduct possible.[558]

While there are many possible mechanisms of this kind to be explored and assessed, one specific measure which could have a valuable regulatory effect is advanced here.

472. We suggest that panels of representatives from the judiciary and the criminal bar could be established with continuing mandates to examine and evaluate the regularity and legality of search warrant documents in particular Canadian jurisdictions. Such evaluations, as well as including the legality of the information and warrant, could cover the return on the warrant with its attached inventory of items seized. In essence, such panels could continue and expand upon the functions performed by the judicial panel utilized in the present study. Like the sample selected for evaluation by the judicial panel, the documents monitored by such panels could be selected on a random basis. Not only could the findings of such bodies be made the subject of consultations with the individual police forces and court officials so as to bolster internal enforcement mechanisms, but they could also be made available to the public to indicate the extent of compliance with legal standards.

473. The effective monitoring of search warrants is arguably a necessary step towards fulfilling the policy recognized in the *MacIntyre* case, *viz.* that public scrutiny of search warrant documents is necessary to ensure that abuse will not go undetected.[559] While public access remains a laudable goal, it is not in itself likely to result in detection of deficiencies, particularly those of a legal nature. Such detection, rather, requires informed analysis, and

in order to put individual cases in perspective, this analysis should be conducted on a systematic basis. Indeed, since it would focus on the larger pattern of activity rather than the individual case, a monitoring panel would not jeopardize the privacy and law enforcement interests at stake in *MacIntyre*. By preserving the anonymity of individuals affected by the monitored searches and presenting the results in cumulative form, the proposed mechanism would reduce to negligible any risk of prejudice to either a concerned individual or the investigation against him.

474. Police and justicial powers have tended to come under scrutiny recently in the specific context of Royal Commissions appointed in response to publicized incidents of alleged abuse or impropriety. To cite a few recent examples in Canada, there have been the Laycraft Inquiry, conducted in the wake of the Royal American Shows investigation in Alberta;[560] the Pringle Report, commenced in response to a mass strip-search conducted at a motel in Fort Erie, Ontario;[561] and, of perhaps most recent significance, the McDonald and Keable Commissions.[562] While such Commissions may serve the public interest in investigating specific instances of alleged abuse, their inquiry is often focused on the outrageous and specific to the detriment of presenting the everyday, general picture. The words of an American Task Force Report on the police may well be applicable to Canada:

> Where there has been inquiry into police practice, it has commonly been precipitated by a crisis, has been directed towards finding incompetence or corruption, and whatever the specific finding, has failed to give attention to the basic law enforcement issues involved.[563]

475. In fact, some systematic monitoring of facets of crime-related procedures has been introduced into Canada in recent years. Of direct relevance is the ongoing evaluation of gun control legislation being conducted for the Solicitor General of Canada.[564] While the scope of the evaluation encompasses a range of aspects far broader than police adherence to legal procedures, the reporters have included conclusions about the legality of existing police practices in their *First Progress Report*; for example, they have criticized abuse of the return procedures in warrantless firearms searches.[565]

476. Considering the strong provincial constitutional interest in regulating search warrant practice, derived from provincial jurisdiction over the "administration of justice",[566] we believe that such monitoring panels should be established on a provincial or local level. By institutionalizing such panels at these levels, the aim of building external mechanisms onto internal structures is likely to be better

served, with respect both to provincial and local police forces and to the provincial courts responsible for the issuance of search warrants. For example, monitoring the performance of justices of the peace in issuing search warrants could be built into any provincial initiatives undertaken to improve the training and qualification of holders of this office.

477. Monitoring exercises would not have to be conducted on a constant basis; periodic review of representative random samples could be sufficient for the regulatory task envisaged here. Moreover, it should be emphasized that, since the present monitoring proposal would focus on the documents already required by law, it would not represent any additional burden upon the police themselves. Any organizational burdens placed upon court administrators responsible for the collation of these documents, as well as the responsibilities, expenses and efforts entailed in assembling a monitoring panel, seem justifiable in the interests of effectively regulating the important and exceptional powers granted for the purposes of search and seizure.

Endnotes

1. See text, *supra*, Part One, paras. 97-100.
2. Alan Grant, *The Police — A Policy Paper* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 16.
3. Although the *Criminal Code* frequently confers warrant issuing functions on "a justice", the organization of Provincial Court officials and the assignment of functions of the "justice" to other judicial ranks remains within provincial discretion. See text, *supra*, paras. 198-205.
4. Grant, *supra*, note 2, pp. 36-38.
5. This is indeed the perception of many municipal and R.C.M.P. officers themselves. For example, when asked whether they used consent forms, a group of municipal officers responded, "No. That's for the R.C.M.P.".
6. Task Force on Policing in Ontario, *Report* (Toronto: 1974), p. 24.
7. See text, *supra*, Part One, paras. 212-227.
8. See text, *supra*, Part One, para. 228.
9. See text, *supra*, Part One, paras. 11-13.
10. Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981), p. 11.
11. Herman Goldstein, *Policing a Free Society* (Cambridge: Ballinger, 1977), p. 160.
12. *MacIntyre* v. *Attorney General of Nova Scotia* (1982), 40 N.R. 181 (S.C.C.).
13. The distinction between "law enforcement", which necessarily involves a violation of the law and "order maintenance", which, though often entailing a legal infraction, involves a dispute or potential disorder, has been drawn by James Q. Wilson, *Varieties of Police Behavior* (Cambridge: Harvard University Press, 1968), pp. 83-84.

14. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 90-91.

15. See text, *supra*, paras. 42-45.

16. See text, *supra*, Part One, paras. 100-113.

17. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), pp. 25-26 (hereinafter cited as the "RCCP Report").

18. See text, *supra*, Part One, paras. 100-113.

19. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976), p. 24.

20. *Robbins* v. *California* (1981), 69 L. Ed. 2d 744.

21. In *New York* v. *Belton* (1981), 69 L. Ed. 2d 768, the United States Supreme Court, on facts involving a vehicle search quite similar to those in *Robbins*, made a contrary finding as to the legality of the policeman's actions. In the recent decision of *United States* v. *Ross* (unreported, June 1, 1982), the Court attempted again to resolve the uncertainty in the area.

22. Martin L. Friedland, *Access to the Law* (Toronto: Carswell, 1975), p. 64.

23. American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975) (hereinafter cited as the *ALI Code*).

24. Australian Law Reform Commission, *Criminal Investigation* (Report #2) (Canberra: Australian Government Publishing Service, 1975) and the *Criminal Investigation Bill, 1981*.

25. RCCP Report, *supra*, note 17.

26. See text, *supra*, paras. 31-34.

27. See text, *supra*, Part One, paras. 117-125.

28. See text, *supra*, paras. 64-69.

29. *Criminal Investigation Bill, 1981*, *supra*, note 24; sections 56-62 deal with search and seizure.

30. *ALI Code*, *supra*, note 23.

31. See text, *supra*, Part One, paras. 67-79.

32. See text, *supra*, Part One, paras. 71-79.

33. *Jones* v. *United States* (1959), 362 U.S. 257.

34. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.).

35. Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in *Studies in Canadian Tort Law*, edited by Allen

M. Linden, (Toronto: Butterworths, 1968), pp. 430-33.

36. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II (London: E. Rider, 1800), p. 113.

37. See John Kaplan, "Search and Seizure: A No Man's Land in the Criminal Law" (1961), 49 Cal. L. Rev. 474, at p. 478.

38. See text, *supra*, paras. 46-50.

39. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965), p. 188.

40. *Ibid.*, p. 208.

41. *Ibid.*, p. 188.

42. Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), p. 156.

43. Dicey, *supra*, note 39, pp. 195-196.

44. *Canadian Charter of Rights and Freedoms*, sections 7, 8, 9, 11, 15.

45. Leon Radzinowicz, *A History of English Criminal Law*, vol. IV (London: Stevens and Sons, 1956), p. 163.

46. Jeremy Bentham, *Principles of Morals and Legislation*, vol. I (London: T. Payne & Son, 1789), pp. 367-368.

47. E. C. S. Wade, "Police Search" (1934), 50 L.Q.R. 354, at p. 364.

48. See text, *supra*, paras. 43-45.

49. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976), p. 3.

50. See the *Criminal Code*, R.S.C. 1970, c. C-34, ss. 450(2)(*d*), 452(1)(*f*), 453(1)(*i*), and 457(7)(*b*).

51. In fact, the party whose premises are searched may not even be a suspect. See text, *supra*, paras. 324-330.

52. Ericson, *Making Crime*, *supra*, note 10, p. 148. Among 96 suspects involved in the investigation studied, 27 were subject to searches of their property.

53. See text, *supra*, Part One, para. 71.

54. *Re Liberal Party of Québec and Mierzwinski* (1978), 46 C.C.C. (2d) 118 (Qué. S.C.), at p. 122.

55. The survey's strategy, methodology and results have been presented in consultation documents prepared for each of the seven cities surveyed. These documents are presently being revised for publication within a single volume. For more details, see note 262, Part One.

56. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196 (Ont. H.C.)

57. Aside from the case of the common law warrant, this would appear to be the requirement, for example, of section 25 of the *Metropolitan Police Courts Act*, 2 & 3 Vict., c. 71, which provided for stolen goods found in the course of search to be conveyed before a magistrate. Under section 26, "such magistrate" could find the possessor guilty of a misdemeanour.

58. *An Act for the Forging and Counterfeiting of Foreign Bills of Exchange*, 43 Geo. 3, c. 139, s. 7.

59. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont. H.C.), at pp. 266, 271.

60. *Dillon* v. *O'Brien* (1887), 16 Cox C.C. 245, at p. 249.

61. *Leigh* v. *Cole* (1853), 6 Cox C.C. 329, at p. 332.

62. R.S.C. 1970, c. E-10, s. 29(7).

63. The distinction between seizure and surveillance has been elaborated in Part one, *supra*, paras. 28-37. Search and seizure powers authorize obtaining "pre-existing information" only.

64. *Access to Information Act*, S.C. 1980-81-82, c. 111, Sch. I, s. 3.

65. *Rex* v. *Burgiss* (1836), 7 Car. & P. 488, 173 E.R. 217 (C.P.).

66. David G. Price, "Police Seizure of Bank Accounts under Section 29, *Criminal Law Amendment Act, 1975*" (1976-77), 19 Crim. L.Q. 86.

67. *Banque Belge pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321 (C.A.).

68. For a discussion of the nature of the bank's relationship to its depositor, see Ian F. G. Baxter, *The Law of Banking and the Canadian Bank Act*, 2nd ed. (Toronto: Carswell, 1968), pp. 9-11.

69. *Regina* v. *Cuthbertson*, [1981] A.C. 470 (H.L.).

70. *Leigh* v. *Cole*, *supra*, note 61, pp. 330-31.

71. See text, *supra*, paras. 123-137.

72. See text, *supra*, paras. 423-435.

73. *Re Thomson*, unreported, August 28, 1979 (Ont. Prov. Ct.).

74. See notes 503 and 504, *infra*.

75. *ALI Code*, *supra*, note 23, s. 210.3(1)(*b*).

76. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*b*).

77. *Criminal Code*, R.S.C. 1970, c. C-34, s. 283.

78. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312.

79. *Criminal Code*, R.S.C. 1970, c. C-34, s. 295.

80. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 4.

81. *Food and Drugs Act*, R.S.C. 1970, c. F-27, ss. 34 and 42.

82. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1).

83. See text, *supra*, paras. 331-338.

84. Out of 1,825 executed warrants captured in our survey, 340 were for stolen property. See note 55, *supra*.

85. *R.* v. *Percival and MacDougall* (1971), 2 C.C.C. (2d) 585 (B.C. S.C.).

86. *Devoe* v. *Long*, [1951] 1 D.L.R. 203 (N.B. C.A.).

87. *Regina* v. *Kotrbaty* (1978), 5 C.R. (3d) S-13 (B.C. S.C.), at p. S-15.

88. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(6).

89. *Smith* v. *The Queen* (1975), 27 C.C.C. (2d) 252 (F.C. T.D.).

90. *Re Hicks and The Queen* (1977), 36 C.C.C. (2d) 91 (Man. C.A.).

91. Incorporated into what is known as *R.I.C.O.* (Rackateer Influenced and Corrupt Organizations) legislation, *in rem* proceedings are found in 18 U.S.C. ss. 1964. These provisions do not deal with all profits of crime but rather those which have been invested in commercial enterprises.

92. *The Business of Crime, An Evaluation of the American R.I.C.O. Statutes from a Canadian Perspective* (hereinafter cited as the "Henderson Report") (Victoria: British Columbia Attorney General, 1980).

93. See text, *supra*, paras. 414-422.

94. *Criminal Code*, R.S.C. 1970, c. C-34, s. 420(1).

95. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3; *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.

96. See text, *supra*, paras. 65-66.

97. Our four-month survey of writ use in seven Canadian cities disclosed 100 incidents in which narcotic and drug writs were used. Use of drug writs was reported in five of these cities: Edmonton (20 instances), Montréal (3), Toronto (8), Winnipeg (10) and Vancouver (59). No incidents of writ use were reported in Fredericton or Saint John. The results of this survey are being assembled for publication in a separate Study Paper.

98. *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 34.

99. *Criminal Code*, R.S.C. 1970, c. C-34, s. 309(1).

100. *Criminal Code*, R.S.C. 1970, c. C-34, s. 159(1)(*a*).

101. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (Ont. Prov. Ct.).

102. *House of Commons Debates*, 1959, vol. V, p. 5547 (July 6, 1959).

103. See, for example, the *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (LeDain Commission) (Ottawa: Information Canada, 1973), p. 130. Although amphetamines were recognized as dangerous, it was recommended that an offence of simple possession *not* be established due to the likelihood of ineffective and discriminatory enforcement of such a provision.

104. See text, *supra*, paras. 414-422.

105. See Lee Paikin, *The Issuance of Search Warrants: A Manual* [a Study Paper prepared for the Law Reform Commission of Canada] (Ottawa: Supply and Services, 1980), p. 41.

106. See note 55, *supra*.

107. *Re Worrall*, [1965] 2 C.C.C. 1 (Ont. C.A.), at p. 5.

108. *Nimbus News*, *supra*, note 101, p. 321.

109. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Ont. Prov. Ct.).

110. *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.), at p. 709.

111. Not one instance of a warrant issued under paragraph 443(1)(*c*) showed up in the judicial panel sample selected in our warrant survey.

112. These were among the objects commonly cited as seized by peace officers reporting in our warrant survey. See note 55, *supra*.

113. Kaplan, note 37, *supra*, p. 478. See also Frederick Pollock and F. W. Maitland, *The History of English Law*, 2nd ed., vol. 2 (Cambridge: University Press, 1911), p. 474.

114. *Re Hicks and The Queen*, *supra*, note 90, p. 96.

115. See text, *supra*, paras. 423-435.

116. *Criminal Code*, R.S.C. 1970, c. C-34, s. 247.

117. *Criminal Code*, R.S.C. 1970, c. C-34, s. 76.1.

118. See, for example, *The Child Welfare Act*, R.S.M. 1970, c. C-80, s. 9(1).

119. *ALI Code*, *supra*, note 23, s. 210.3(1)(*d*).

120. *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*a*), as amended April 30, 1979.

121. *Eccles* v. *Bourque, Simmonds and Wise* (1975), 27 C.R.N.S. 325 (S.C.C.), at p. 326.

122. This power was recognized by the Ouimet Committee in its report: *Report of the Canadian Committee on Corrections* (Ottawa: Information Canada, 1969), p. 59 (hereinafter cited as the "Ouimet Report"). See text, *supra*, Part One, paras. 129-130.

123. See text, *supra*, para. 37.

124. See text, *supra*, Part One, paras. 229-232.

125. Ericson, *Making Crime*, *supra*, note 10, p. 154.

126. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61.

127. *ALI Code*, *supra*, note 23, s. 240.2.

128. See text, *supra*, Part One, paras. 221-225.

129. Ouimet Report, *supra*, note 122, p. 41.

130. Project on Law Enforcement Policy, Arizona State University Law School, "Model Rules for Law Enforcement: Warrantless Searches of Persons and Places" (1973), 9 Crim. L. Bull. 645, at p. 680.

131. Ericson, *Making Crime*, *supra*, note 10, p. 154.

132. Arthur Maloney, "The Court and the Police Functions in the Developing of Effective Canadian Corrections" (1960), 2 Crim. L.Q. 164, at p. 177.

133. Ouimet Report, *supra*, note 122, p. 119.

134. Harry Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968), p. 76.

135. *Chromiak* v. *The Queen* (1979), 49 C.C.C. (2d) 257 (S.C.C.).

136. *Criminal Code*, R.S.C. 1970, c. C-34, s. 234.1.

137. See text, *supra*, para. 20.

138. See Martin R. Gardner, "Consent as a Bar to Fourth Amendment Scope — A Critique of a Common Theory" (1980), 71 J. Crim. L. & Criminology 443. Gardner's article also canvasses authorities against this position.

139. *Ibrahim* v. *The King*, [1914] A.C. 599 (P.C.), at p. 609.

140. *Boudreau* v. *The King*, [1949] S.C.R. 262, at p. 269.

141. *Goldman* v. *The Queen* (1979), 51 C.C.C. (2d) 1.

142. *Ibid.*, p. 24.

143. *Rosen* v. *The Queen* (1979), 51 C.C.C. (2d) 65, at p. 75.

144. *Goldman* v. *The Queen*, *supra*, note 141, p. 24.

145. *Schneckloth* v. *Bustamonte* (1972), 412 U.S. 218, at pp. 248-249.

146. See, for example, Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada* (New York: M. E. Sharpe, 1980).

147. RCCP Report, *supra*, note 17, p. 37.

148. Instructions regarding consent search were included in R.C.M.P., *Operational Manual* from "O" Division, circulated in 1977. Other divisions of the R.C.M.P. told our researchers that they did not use such guidelines.

149. David Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell, 1979), p. 61.

150. *Report of the Commission of Inquiry Relating to the Security and Investigation Services Branch within the Post Office Department* (Ottawa: Supply and Services, 1981), p. 159.

151. RCCP Report, *supra*, note 17, p. 37.

152. *Criminal Investigation*, *supra*, note 24, p. 97.

153. *Laporte* v. *Laganière J.S.P.* (1972), 18 C.R.N.S. 357 (Qué. Q.B.), at p. 365.

154. *Leigh* v. *Cole*, *supra*, note 61.

155. *Bessell* v. *Wilson* (1853), 20 L.T. 233.

156. Dangerous driving, according to subsection 233(4) of the *Criminal Code*, R.S.C. 1970, c. C-34, is a hybrid offence; accordingly, an officer could release an accused after arrest under paragraph 452(1)(*b*).

157. *ALI Code*, *supra*, note 23, s. 230.2

158. This matter is being addressed by the Law Reform Commission of Canada in a separate Working Paper.

159. See *New York* v. *Belton*, *supra*, note 21; *Robbins* v. *California*, *supra*, note 20; and *United States* v. *Ross*, *supra*, note 21.

160. See text, *supra*, paras. 146-147.

161. *Chimel* v. *California* (1960), 395 U.S. 752, at p. 763.

162. RCCP Report, *supra*, note 17, p. 63.

163. See, for example, *R.* v. *Stonechild* (1981), 61 C.C.C. (2d) 251 (Man. Co. Ct.) and *R.* v. *Landry* (1981), 63 C.C.C. (2d) 289 (Ont. C.A.). The latter case, which is on appeal to the Supreme Court of Canada, may conflict with *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121.

164. See, for example, the dissent of Frankfurter J. in *United States* v. *Rabinowitz* (1950), 339 U.S. 56, at p. 79.

165. See text, *supra*, paras. 211-219.

166. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443.

167. See text, *supra*, paras. 267-270.

168. See text, *supra*, paras. 288-298.

169. See text, *supra*, paras. 32-33.

170. See text, *supra*, Part One, para. 125.

171. See text, *supra*, paras. 32-33.

172. *ALI Code*, *supra*, note 23, s. 230.1(2).

173. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (Alta. C.A.), at p. 302.

174. See text, *supra*, paras. 423-435.

175. *United States* v. *Ross*, *supra*, note 21.

176. *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.

177. See text, *supra*, Part One, para. 98 for an explanation of why narcotic and drug legislation is considered to be "crime related".

178. See note 97, *supra*.

179. *Criminal Code*, R.S.C. 1970, c. C-34, s. 312; *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 3.

180. See text, *supra*, Part One, para. 54.

181. Search powers related to motor vehicles may be found in provincial liquor legislation. R.S.B.C. 1979, c. 237, s. 67; R.S.A. 1980, c. L-17, ss. 115, 117; R.S.S. 1978, c. L-18, s. 131; R.S.M. 1970, c. L160, s. 248; R.S.O. 1980, c. 244, s. 48(2); R.S.N.B. 1973, c. L-10, ss. 163, 165; R.S.N.S. 1967, c. 169, s. 126; R.S.P.E.I. 1974, c. L-17, s. 60; S.N. 1973, c. 103, s. 93.

182. *Chambers* v. *Maroney* (1969), 399 U.S. 42, at pp. 50-51.

183. *ALI Code*, *supra*, note 23, s. 260.3.

184. RCCP Report, *supra*, note 17, p. 30.

185. See text, *supra*, paras. 157-163.

186. *Chromiak* v. *The Queen*, *supra*, note 135.

187. *Robbins* v. *California*, *supra*, note 20.

188. *New York* v. *Belton*, *supra*, note 21.

189. *United States* v. *Ross*, *supra*, note 21.

190. See text, *supra*, Part One, paras. 55-56.

191. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1)(*d*).

192. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques and Michael

McAuley, *Evaluation of the Canadian Gun Control Legislation: First Progress Report* (Ottawa: Supply and Services, 1981), pp. 129-133.

193. *United States* v. *Rubin*, 474 F. 2d 262 (3d. Circ.) cert. denied (1973), 414 U.S. 833, at p. 268. See also: Linda Mullenbach, "Warrantless Residential Searches to Prevent the Destruction of Evidence" (1979), 70 J. Crim. L. & Criminology 255.

194. RCCP Report, *supra*, note 17, p. 33.

195. *ALI Code*, *supra*, note 23, s. 230.1(1).

196. *Ibid.*, Commentary, p. 263.

197. RCCP Report, *supra*, note 17, pp. 26-27.

198. See text, *supra*, Part One, para. 81.

199. Advisory Committee on Drug Dependence [Home Office], *Powers of Arrest and Search in Relation to Drug Offences* (London: Her Majesty's Stationery Office, 1970), p. 39.

200. Richard V. Ericson, *Reproducing Order* (Toronto: University of Toronto Press, 1982), p. 157.

201. See note 55, *supra*.

202. See text, *supra*, Part One, paras. 19-21.

203. *R.* v. *Whitfield*, [1970] S.C.R. 46.

204. L. H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), pp. 50-51. See *Barnett and Grant* v. *Campbell* (1902), 21 N.Z.L.R. 484 (C.A.) at p. 493, *per* Cooper J.

205. *Dillon* v. *O'Brien*, *supra*, note 60.

206. The following are examples of things, possession of which constitutes an indictable or hybrid offence under the *Criminal Code*, R.S.C. 1970, c. C-34: a forged passport (s. 58(3)), a concealed weapon (s. 87), a prohibited weapon (s. 88), an unregistered restricted weapon (s. 89), a stolen credit card (s. 301.1), property obtained by crime (s. 312) and counterfeit money (s. 408). In addition, there are the possession offences under section 3 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and sections 34(2) and 41 of the *Food and Drugs Act*, R.S.C. 1970, c. F-27.

207. *Criminal Code*, R.S.C. 1970, c. C-34, s. 450(1)(*b*).

208. See text, *supra*, para. 158.

209. *The Brixton Disorders, 10-12 April, 1981*, Report of an Inquiry by the Rt. Hon. Lord Scarman, Cmnd. 8427 (1982), pp. 56-61.

210. See, for example, the Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, *Report* (1975)

(hereinafter cited as the "Pringle Report").

211. See, for example, Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 Chitty's L.J. 199.

212. *Moore* v. *The Queen*, [1979] 1 S.C.R. 115; *Dedman* v. *The Queen* (1981), 59 C.C.C. (2d) 97 (Ont. C.A.).

213. See text, *supra*, paras. 257-258.

214. *Re Worrall*, *supra*, note 107, p. 11. Although Roach J.A. was writing in dissent, the majority did not disagree on this point.

215. *Re Den Hoy Gin* (1965), 47 C.R. 89 (Ont. C.A.).

216. See Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates" (1973), 64 J. of Crim. L. and Criminology 270.

217. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (P.E.I. S.C.), at p. 251.

218. See note 55, *supra*.

219. *R.* v. *Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), at p. 11.

220. See text, *supra*, Part One, para. 219.

221. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (Ont. C.A.).

222. See *United States* v. *Chadwick* (1977), 433 U.S. 1, at p. 9, *per* Burger C.J.

223. See P. A. Kolers, "Readibility" in Friedland, *supra*, note 22, pp. 136-8.

224. James Fontana, *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974), p. 7.

225. *Re Pacific Press and The Queen*, *supra*, note 34.

226. Ericson, *Making Crime*, *supra*, note 10, pp. 152-53.

227. For case-law on forum-shopping in the context of arrest warrants, see *R.* v. *Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.).

228. Recent Canadian cases on particularity include *Re Abou-Assale and Pollock and The Queen* (1978), 39 C.C.C. (2d) 546 (Qué. S.C.), *PSI Mind*, *supra*, note 59, and *Royal American Shows Inc.* v. *The Queen*, [1975] 6 W.W.R. 571 (Alta. S.C.).

229. See *The Issuance of Search Warrants*, *supra*, note 105, p. 17.

230. See also the approach of the Advisory Committee on Drug Dependence, *supra*, note 199, p. 42.

231. *Re Newfoundland & Labrador Corp. Ltd.* (1974), 6 Nfld. & P.E.I.R. 274 (Nfld. C.A.).

232. *Re Abou-Assale and Pollock and The Queen*, *supra*, note 228.

233. *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (Qué. S.C.).

234. The judicial panellists evaluating the Montréal documents (and indeed the judicial panel as a whole) were provided with *The Issuance of Search Warrants*, *supra*, note 105, a handbook prepared for the Commission. The handbook outlined all of the relevant cases, including *Abou-Assale* and *Regency Realties Inc.* In evaluating the documents, it is evident that the panellists were inclined towards the stricter view adopted in the latter case. See note 262, Part One, *supra*.

235. *Re Lubell and The Queen* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.), at p. 190.

236. For a discussion of informer privilege, see *Bisaillon* v. *Keable and Attorney General of Québec* (1980), 17 C.R. (3d) 193 (Qué. C.A.), at p. 232, *per* L'Heureux-Dubé J.A.

237. *Re Newfoundland & Labrador Corp. Ltd.*, *supra*, note 231, p. 281.

238. See *Royal American Shows Inc.* v. *The Queen*, *supra*, note 228. According to the Laycraft Report, the fact that the basis of the search warrant application was an intercepted communication was unknown to Mr. Justice Cavanagh, who heard the motion to quash the search warrant: *Royal American Shows Inc. and Its Activities in Alberta, Report of a Public Inquiry* (June, 1978), p. B-27.

239. The only exceptions to this rule are found in sections 101, 160, and 281.3 of the *Criminal Code*, R.S.C. 1970, c. C-34.

240. See, for example, *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 24(3).

241. New Brunswick actually retains justice of the peace legislation. *The Justice of the Peace Act*, R.S.N.B. 1952, c. 122, was not consolidated in the 1973 revised statutes, but nor has it been repealed. Justices are simply no longer appointed in the province.

242. Alberta Board of Review, *Administration of Justice in the Provincial Courts of Alberta* (1975), at p. 18 (hereinafter cited as the "Kirby Report").

243. See note 55, *supra*.

244. See sections 455.3, 457, 465, and 720 of the *Criminal Code*, R.S.C. 1970, c. C-34, respectively.

245. Pringle Report, *supra*, note 210, p. 20.

246. Royal Commission of Inquiry into Civil Rights, *Report Number One* (1968), p. 518. (hereinafter cited as the "McRuer Report").

247. The *Crown Attorneys Act*, R.S.O. 1980, c. 107, s. 12(*h*), and *The Crown Attorneys Act*, R.S.M. 1970, c. C330, s. 6(1)(*b*).

248. Royal Commission on Justices of the Peace, 1946-48, *Report* (London: Her Majesty's Stationery Office, 1948), and *The Training of Justices of the Peace in England and Wales* (London: Her Majesty's Stationery Office, 1965).

249. *Coolidge* v. *New Hampshire*, *supra*, note 166.

250. The Kirby Report, *supra*, note 242, and the McRuer Report, *supra*, note 246, are two examples.

251. Kirby Report, *supra*, note 242, p. 20.

252. Law Reform Commission of Canada, *Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1975), p. 41.

253. ALRC, Report #2, *supra*, note 24, p. 95.

254. See, for example, *People* v. *Aguirre* (1972), 103 Cal. R. 153. For a discussion of oral search warrant cases, see Paul D. Beechen, "Oral Search Warrants: A New Standard of Warrant Availability" (1973), 21 U.C.L.A. L. Rev. 691, at p. 694.

255. For an excellent example of an oral warrant system at work, see Charles E. Bell, "Telephonic Search Warrants" (1976), 5 San Diego City L. Enforcement Q. 10.

256. Beechen, *supra*, note 254, p. 702.

257. Bell, *supra*, note 255.

258. Hale, *supra*, note 36, p. 150.

259. Hawkins, while speaking expressly of warrants to arrest, encompasses within this subject the warrants to search for stolen goods which Hale had developed. In so doing he concedes that a warrant could be directed to "any constable or even a private person". See William Hawkins, *A Treatise of the Pleas of the Crown*, vol. II, 8th ed. (London: Sweet and Maxwell, 1824), p. 130.

260. *Criminal Code*, R.S.C. 1970, c. C-34, s. 449(3).

261. *Hetu* v. *Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128, at p. 132.

262. Law Reform Commission of Canada, *Control of the Process*, *supra*, note 252, p. 41.

263. This proposition may be traced to the seventeenth-century philosopher, Thomas Hobbes. See Hobbes, *Leviathan* (London: Penguin, 1968), pp. 227-8, and also Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (New York: Franklin, 1883), p. 184.

264. *Fanning* v. *Gough* (1908), 18 C.C.C. 66 (P.E.I. S.C.).

265. *R.* v. *Solloway & Mills* (1930), 53 C.C.C. 271 (Ont. S.C. A.D.).

266. *Re Old Rex Café* (1972), 7 C.C.C. (2d) 279 (N.W.T. Terr. Ct.).

267. *Re Goodbaum and The Queen*, *supra*, note 221.

268. Hale, *supra*, note 36.

269. For example, of the section 443 warrants captured in our survey that were valid by day only, 87% were executed by day. See note 55, *supra*.

270. See the *French Code of Criminal Procedure*, article 59 (12-31-57); the translation used in preparing this study was by Kock, *The French Code of Criminal Procedure* (South Hackensack, New Jersey: Rothman, 1964). Substantial amendments to this Code, sharply curtailing the role of the *juge d'instruction*, were recently introduced, but these did not affect the provisions relevant to the present study.

271. *Crimes Act* 1914 (Cwlth., No. 12), s. 10.

272. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(4)(*b*)(ii).

273. William E. Ringel, *Searches & Seizures, Arrests and Confessions* (New York: Clark Boardman, 1972), p. 243.

274. *Regina* v. *Execu-Clean Ltd.*, unreported, January 30, 1980 (Ont. H.C.).

275. See note 55, *supra*.

276. *R.* v. *Adams*, [1980] 1 All E.R. 473 (C.A.).

277. See note 55, *supra*.

278. See *The Liquor Control Act*, R.S.M. 1970, c. L160, s. 244(1).

279. See the RCCP Report, *supra*, note 17, p. 36, and the *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 61(5)(*a*)(iii) and s. 61(5)(*b*)(iv).

280. For other expiry periods see the *ALI Code*, *supra*, note 23, s. 220.2(2)(*g*) (5 days), and the American *Federal Rules of Criminal Procedure*, 18 U.S.C. Rule 41(*c*)(1) (10 days).

281. Metropolitan Toronto Police, *Training Précis, Search of Persons and Premises* (March, 1978), p. 19.

282. See note 55, *supra*.

283. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 Q.B. 299 (C.A.), at p. 313.

284. See text, *supra*, paras. 316-321.

285. *Stanley* v. *Georgia* (1969), 394 U.S. 557, at p. 572.

286. See text, *supra*, paras. 267-270.

287. Law Reform Commission of Canada, *The General Part — Liability*

and Defences [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 111.

288. See text, *supra*, paras. 271-298.

289. See text, *supra*, para. 412.

290. *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.). See also *Harbison* v. *Chicago, R.I. and R.R. Co.* (1931), 37 S.W. Rep. 2d 609 (Mo. Sup. Ct.).

291. Ontario Police College, *Probationary Constable Training Outline*, Part A, No. 5, p. 1.

292. Metropolitan Toronto Police, *Training Précis, Narcotics & Drugs Programme*, Appendix (September, 1977), pp. 47-48.

293. See text, *supra*, paras. 288-298.

294. *Semayne's Case* (1603), 5 Co. Rep. 91a, 77 E.R. 194 (K.B.), at p. 195.

295. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (Alta. C.A.).

296. *Eccles* v. *Bourque, Simmonds and Wise*, *supra*, note 121, p. 330.

297. See *Dunfee* v. *State* (1975), 346 A. 2d 173 (Del. Supr.), and *U.S.* v. *Johns* (1972), 466 F. 2d 1364 (C.A. 5th Cir.).

298. *U.S.* v. *West* (1964), 328 F. 2d 16 (C.A. 2d. Cir.).

299. *Levitz* v. *Ryan*, *supra*, note 290.

300. *ALI Code*, *supra*, note 23, s. 220.3(4).

301. On some warrants issued in Montréal at the time of our warrant survey, the "reasonable grounds" on the information were duplicated on the warrant due to use of carbons. However, these grounds were usually specified merely as "police investigation".

302. See text, *supra*, paras. 304-315.

303. RCCP Report, *supra*, note 17, p. 29.

304. *Levitz* v. *Ryan*, *supra*, note 290.

305. See text, *supra*, Part One, paras. 17-27 for our distinction between powers of arrest and search and seizure.

306. *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261 (F.C.A.).

307. RCCP Report, *supra*, note 17, p. 29.

308. *French Code*, *supra*, note 270, arts. 57, 66, and 96.

309. Metro Toronto Police, *supra*, note 281, p. 19.

310. *Entick* v. *Carrington* (1765), St. Tr. 1067.

311. *Federal Rules of Criminal Procedure* 18 U.S.C. Rule 41(*d*).

312. RCCP Report, *supra*, note 17, p. 36.

313. See text, *supra*, paras. 131-133.

314. See text, *supra*, paras. 237-238.

315. *Coolidge*, *supra*, note 166, p. 467.

316. *Ibid.*, p. 468.

317. Sheldon R. Shapiro, *Annotation: Search and Seizure: Observation of Objects in "Plain View" — Supreme Court Cases* (1972), 29 L. Ed. 2d 1067, at p. 1069.

318. *Ibid.*, p. 1073.

319. *Coolidge*, *supra*, note 166, pp. 467-68, 471.

320. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10(1)(*b*).

321. *R.* v. *Jaagusta* (1974), 3 W.W.R. 766; followed in *R.* v. *Erickson* (1978), 39 C.C.C. (2d) 447 (Ont. Dist. Ct.).

322. Pringle Report, *supra*, note 210.

323. *Ibid.*, pp. 59 and 72. Slightly different instructions, permitting strip searches "on reasonable and probable grounds that the suspect has physical possession of evidence or a weapon", were found in a 1977 divisional R.C.M.P. Operational Manual.

324. See note 55, *supra*.

325. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

326. See, *The Brixton Disorders*, *supra*, note 209.

327. *Ybarra*, *supra*, note 325, uses both "reasonableness" and "probable cause" criteria.

328. *Terry* v. *Ohio* (1967), 392 U.S. 1.

329. RCCP Report, *supra*, note 17, p. 29.

330. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 57(1).

331. See text, *supra*, Part One, para. 81.

332. See notes 23-24, *supra*, as well as sections 101 and 353 of the *Criminal Code*, R.S.C. 1970, c. C-34.

333. This comment may also be directed at section 101, which permits searches without warrant when search with warrant would be impracticable. The history of section 101 discloses that the warrant provision was enacted before the provision for warrantless search and that when the latter was introduced it was envisaged as applicable only in exceptional cases. See text, *supra*, Part One, paras. 173-177.

334. See text, *supra*, Part One, para. 207.

335. Of personal searches in the course of executed *Narcotic Control Act* and *Food and Drugs Act* warrants reported in our warrant survey, 22.4% were reported to involve strip search and 0.1%, internal search. The corresponding figures for other kinds of warrants were 5.3% and 0.5%. See note 55, *supra*.

336. See text, *supra*, para. 273.

337. *Giordano* v. *State* (1953), 100 A. 2d 31 (Md. C.A.).

338. *Rex* v. *Gibson* (1919), 30 C.C.C. 308 (Alta. S.C.).

339. *Royal American Shows Inc.*, *supra*, note 228.

340. See text, *supra*, Part One, para. 232.

341. See *State* v. *De Simone* (1972), 288 A. 2d 849 (N.J. Sup. Ct.), for a discussion of the problem.

342. *Criminal Investigation*, *supra*, note 24, p. 58. The ALRC recommendations were implemented in the *Customs Amendment Act* 1979 (Cwlth., No. 92), s. 6, under which searches of body cavities must be authorized by warrant and carried out by a medical practitioner.

343. Pringle Report, *supra*, note 210, p. 63.

344. Advisory Committee on Drug Dependence, *supra*, note 199, p. 39.

345. Pringle Report, *supra*, note 210.

346. See for example, the Ontario Police College, *Search and Seizure Précis* (1976), p. 31.

347. *Laporte* v. *Laganière J.S.P.*, *supra*, note 153.

348. *Rochin* v. *California* (1981), 342 U.S. 165.

349. Louis S. Goodman and Alfred Zack Gilman (eds.), *The Pharmacological Basis of Therapeutics*, 4th ed. (New York: Macmillan, 1970), p. 381 (cocaine), p. 247 (morphine and other opiates), p. 108 (barbiturates).

350. *Scott* v. *The Queen*, *supra*, note 306, p. 269.

351. See text, *supra*, paras. 271-275.

352. This statement of R.C.M.P. policy was set out in the Pringle Report, *supra*, note 210, p. 60.

353. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.1.

354. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 194.

355. *Ibid.*, p. 205.

356. *MacIntyre* v. *Attorney General of Nova Scotia and Grainger* (1980),

38 N.S.R. (2d) 633, at p. 655.

357. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 192.

358. *Realty Renovations Ltd.* v. *Attorney General of Alberta* (1978), 44 C.C.C. (2d) 249, at p. 253. This conclusion was also reached by the British Royal Commission on Criminal Procedure. See RCCP Report, *supra*, note 17, p. 36.

359. *Privacy Act*, S.C. 1980-81-82, c. 111, Sch. II, s. 3.

360. See the United States *Freedom of Information Act*, Title 5 U.S.C. (1976), s. 552(b)(e)(7) which exempts: "investigatory records compiled for law enforcement purposes ... to the extent that the production of such records would ... constitute an unwarranted invasion of personal privacy."

361. *Kimber* v. *The Press Association Ltd.*, [1893] 1 Q.B. 65 (C.A.), at p. 68.

362. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12, p. 191.

363. See text, *supra*, paras. 460-468.

364. *Canadian Bill of Rights*, s. 1(*f*). See also the *Canadian Charter of Rights and Freedoms*, s. 2(*b*).

365. *Re F.P. Publications (Western) Ltd. and The Queen* (1979), 51 C.C.C. (2d) 110.

366. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 457.2(1) and 467(1).

367. Of the 1,879 executed warrants reported in our warrant survey, 14.6% involved searches of telephone companies.

368. See, for example, J. S. Williams, *The Legal Protection of Privacy* (Ottawa: Information Canada, 1974).

369. See text, *supra*, para. 296.

370. *ALI Code*, *supra*, note 23, ss. 280.2(2).

371. See text, *supra*, Part One, note 262.

372. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 495.

373. *Criminal Code*, R.S.C. 1970, c. C-34, s. 629.

374. See text, *supra*, Part One, note 262.

375. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (B.C. S.C.), at p. 341.

376. 42 U.S.C. 2000 aa 11.

377. See text, *supra*, paras. 62-63.

378. *Business Practices Act*, R.S.O. 1980, c. 55, s. 12(1).

379. The Uniform Law Conference of Canada was held in Saskatoon, August 16-25, 1979. The freezing order scheme was adopted by the Criminal Law Section. See the Uniform Law Conference of Canada, *Proceedings of the Sixty-First Annual Meeting* (1979), p. 44.

380. Henderson Report, *supra*, note 92. Attached to the Report was draft legislation. Interim freezing orders were covered in section 6.

381. 18 U.S.C. 1963 (b). For a discussion of the scope of freezing orders under American legislation, see Harry Myers and Joseph P. Brzostowski, *Drug Agents' Guide to Forfeiture of Assets* (Washington: U.S. Gov't. Printing Office, 1981), pp. 331-333.

382. *West Mercia Constabulary* v. *Wagener*, [1982] 1 W.L.R. 127 (Q.B.).

383. *Criminal Law Amendment Act, 1978*, (Bill C-21), s. 59. The sealing procedure set up by this legislation was endorsed by the Canadian Bar Association in a motion calling for protection of the solicitor-client privilege: Resolution No. 11, passed August 28, 1980.

384. As this Working Paper is being completed, no decision in *Mierzwinski* has been delivered by the Supreme Court.

385. *R.* v. *Colvin*, *supra*, note 219.

386. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

387. *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70 (F.C.A.), at pp. 78-79.

388. *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 232.

389. Manitoba Law Reform Commission, *Report on Enforcement of Revenue Statutes* (1979), pp. 24-25.

390. *Canadian Charter of Rights and Freedoms*, s. 2(*b*).

391. *Zurcher* v. *Stanford Daily* (1978), 436 U.S. 547.

392. *The Privacy Protection Act of 1980*, introduced in response to the *Zurcher* case, contains provisions which would in large measure overrule the majority opinion, subject to a number of exceptions, including the need to intervene in cases of national security and danger to human life. It is now unlawful to search for or seize "work product" materials in the possession of journalists: 42 U.S.C. 2000 aa.

393. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 494.

394. See text, *supra*, paras. 324-330.

395. *Senior* v. *Holdsworth; Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23.

396. *Ibid.*, p. 34.

397. *Reid* v. *Telegram Publishing Co. Ltd. and Area* (1961), 28 D.L.R. (2d) 6.

398. *McConachy* v. *Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349.

399. *Rapport de la Commission d'enquête sur des opérations policières en territoire québécois* (Québec: Gouvernement du Québec, 1981) (hereinafter cited as the "Keable Report").

400. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law* (Second Report); (Ottawa: Supply and Services, 1981) (hereinafter cited as the "McDonald Report").

401. Keable Report, *supra*, note 399, p. 423. McDonald Report, *supra*, note 400, p. 1019.

402. Keable Report, *supra*, note 399, pp. 247-308.

403. *Ibid.*, p. 259.

404. McDonald Report, *supra*, note 400, pp. 115-117.

405. A public submission to the McDonald Commission by the R.C.M.P. concluded that "when the legality of intelligence probes is considered, their legality is less than clear".

406. The McDonald Report's position was criticized in a memorandum, dated June 14, 1981, prepared for the Department of Justice by the law firm of Lang, Michener, Farquharson and Wright. It was released by the Department on August 27, 1981, along with a memorandum by the Honorable Wishart Spence, the former puisne judge of the Supreme Court of Canada.

407. *Re Bell Telephone Company of Canada*, *supra*, note 56, p. 197.

408. *Ghani* v. *Jones*, *supra*, note 110, and *Eccles* v. *Bourque*, *Simmonds and Wise*, *supra*, note 121, are cited in the Lang, Michener memorandum, note 406.

409. *Colet* v. *The Queen* (1981), 57 C.C.C. (2d) 105 (S.C.C.).

410. *R.* v. *Dass* (1979), 47 C.C.C. (2d) 194 (Man. C.A.); leave to appeal to the Supreme Court of Canada denied at p. 214 .

411. *United States* v. *Dalia* (1979), 441 U.S. 238.

412. See, for example, *Wah Kie* v. *Cuddy (No. 2)*, *supra*, note 295. In American case-law it has been held that the "no knock" rule is not confined to covert entry: *United States* v. *Dalia*, *supra*, note 411, pp. 247-248.

413. McDonald Report, *supra*, note 400, p. 1019.

414. *Ibid.*, pp. 592-598.

415. *Ibid.*, pp. 571-572.

416. *Ibid.*, pp. 594-596 and in particular, subsections (2)(a) and 8(c) of the proposed legislation.

417. See text, *supra*, Part One, paras. 78-79.

418. McDonald Report, *supra*, note 400, pp. 140, 570.

419. See text, *supra*, paras. 42-50.

420. See text, *supra*, Part One, para. 73.

421. McDonald Report, *supra*, note 400, p. 108.

422. See text, *supra*, paras. 55-60.

423. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12.

424. See Recommendations 26, 27, 28, 29, 35 and 36.

425. *McDonald Report*, *supra*, note 400, p. 1019.

426. *Ibid.*, pp. 115-117.

427. *Ibid.*, p. 116.

428. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.22. See also Canada, House of Commons, *Standing Committee on Justice and Legal Affairs, Minutes of Proceedings*, June 5, 1973, p. 13: 6 and *House of Commons Debates*, November 27, 1973, p. 8199.

429. Louise Savage, "An Analysis of the Federal and Provincial Annual Reports relating to the Use of Court Authorized Electronic Surveillance by Law Enforcement Officials in Canada" (an unpublished study prepared for the Law Reform Commission of Canada, 1979), pp. 69-76.

430. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 178.12(3) and 178.23(3).

431. *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.14.

432. See text, *supra*, paras. 55-61.

433. See the Keable Report, *supra*, note 399, pp. 241-308, 349-379.

434. *Gouled* v. *United States* (1921), 255 U.S. 298, at p. 306.

435. *United States* v. *Dalia*, *supra*, note 411, p. 247.

436. See, for example, Bill C-26, 1977-78, which would have added a mail-opening power to the *Criminal Code*. See also Recommendation 268 of the McDonald Report, *supra*, note 400, p. 1113.

437. See text, *supra*, Part One, paras. 84-95.

438. See, for example, *Payton* v. *New York* (1979), 445 U.S. 573, at pp. 583-584.

439. R.S.C. 1970, c. C-40, s. 139.

440. R.S.C. 1970, c. E-12, s. 76.

441. These requirements are set out in the 1980 R.C.M.P. Operations Manual.

442. See text, *supra*, para. 321.

443. See text, *supra*, Part One, para. 71.

444. Solicitor General Robert Kaplan has indicated his willingness to apply greater safeguards, but at the time of completion of this Working Paper, he has not put forward specific proposals. See "Kaplan Pushing to Renovate R.C.M.P. Search and Seizure Power", *Globe & Mail*, October 30, 1981.

445. These proposals were contained in a press release, dated April 6, 1978, issued by the Minister of Justice. See also "Ottawa Retreats from Its Intention to Abolish Long-running Search Writs", *Globe & Mail*, March 14, 1978.

446. *Re Writs of Assistance*, [1965] 2 Ex. C.R. 645.

447. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 38, for statements of Solicitor General Robert Kaplan in this regard.

448. See note 97, *supra*. While 80% of writs reported in our survey resulted in something being seized, 63% resulted in the seizure of the object which the officer specified in his account of the grounds for search. The figures for *Narcotic Control Act* and *Food and Drugs Act* writs are higher: 94% and 71%.

449. See *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, November 26, 1981, p. 56: 25. See also the Ouimet Report, *supra*, note 122, pp. 65-67.

450. See text, *supra*, Part One, para. 210.

451. See note 163, *supra*.

452. See text, *supra*, paras. 211-219.

453. Ouimet Report, *supra*, note 122, pp. 65-67.

454. A possession offence was reported in 29% of the 165 instances of writ use, a trafficking offence (including possession for the purpose of trafficking) in 28.5%. Heroin was reported as sought in almost half of the possession cases.

455. ALRC, *Criminal Investigation*, *supra*, note 24, p. 92.

456. Bill C-53, 1980-81, s. 11. [Ed. note: See S.C. 1980-81-82, c. 125, s. 12].

457. But see *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*,

[1964] 3 C.C.C. 82 (B.C. S.C.).

458. See text, *supra*, Part One, paras. 145-146.

459. Foster, *supra*, note 457.

460. Of the searches of bawdy- and gaming-houses reported in the warrant survey, 125 were performed with section 443 warrants, 82 with section 181 warrants. This was largely a product of the situation reported in Montréal, in which the relevant figures were 109 and 55 respectively. Toronto and Edmonton also showed a division of gaming- and bawdy-house searches between section 443 and section 181 warrants. See *supra*, Part One, note 262.

461. *Re Sommerville's Prohibition Application* (1962), 38 W.W.R. 344 (Sask. Q.B.), at p. 351.

462. *Rockert* v. *The Queen*, [1978] 2 S.C.R. 704.

463. Law Reform Commission of Canada, *Our Criminal Law*, *supra*, note 49, p. 35.

464. See text, *supra*, paras. 97-100.

465. See text, *supra*, Part One, paras. 178-180.

466. Law Reform Commission of Canada, *Theft and Fraud* [Working Paper No. 19] (Ottawa: Supply and Services, 1977), p. 57.

467. See, for example, Ontario Police College, *Search and Seizure Précis* (May, 1976), p. 27.

468. Statistics provided by Canadian Centre for Justice Statistics.

469. *Ibid.*

470. See, for example, *The Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, c. 335.

471. See note 467, *supra*.

472. See note 55, *supra*.

473. In what was intended as a pilot study of warrantless search practices, the Law Reform Commission carried out a self-reporting survey in a downtown Toronto division over a ten-day period. Of the 371 person searches and 73 vehicle searches captured, 19.4% and 35.6% respectively were reported as including drugs as an object.

474. *Misuse of Drugs Act 1971*, s. 23(3) (U.K.).

475. RCCP Report, *supra*, note 17, p. 33.

476. *Payton* v. *New York*, *supra*, note 438, pp. 586-587.

477. *Criminal Investigation Bill, 1981*, *supra*, note 24, s. 60(1), and ALRC, *Criminal Investigation*, *supra*, note 24, p. 96.

478. *Misuse of Drugs Act 1975*, (Cwlth., No. 112) s. 18(2).

479. See text, *supra*, paras. 147-150.

480. See text, *supra*, Part One, para. 159.

481. *Ybarra* v. *Illinois*, *supra*, note 325.

482. Pringle Report, *supra*, note 210, p. 70.

483. See note 55, *supra*. Seizures of objects "in clear view" accounted for 47.3% of marijuana seizures and 10% of chemicals seizures. Corresponding figures for "cupboards, drawers, files, etc." were 47.4% and 43.6%.

484. S.C. 1960-61, c. 35, s. 10; S.C. 1960-61, c. 37, s. 1.

485. See text, *supra*, paras. 244-249.

486. See text, *supra*, Part One, para. 139. If the search and seizure powers were removed from the *Narcotic Control Act*, R.S.C. 1970, c. N-1, *Goodbaum*, *supra*, note 221, would arguably lose its value as a precedent and the general rules in the *Criminal Code*, R.S.C. 1970, c. C-34, would be applicable to narcotic searches.

487. See text, *supra*, para. 50.

488. See text, *supra*, paras. 42-44.

489. See, for example, *R.* v. *Penthouse Magazine* (1977), 37 C.C.C. (2d) 376 (Ont. Co. Ct.).

490. *R.* v. *Pipeline News* (1971), 5 C.C.C. (2d) 71 (Alta. Dist. Ct.).

491. In *R.* v. *Penthouse International Ltd.* (1979), 23 O.R. (2d) 786, for example, the Ontario Court of Appeal handed down its decision eighteen months after the seizure.

492. See the Law Reform Commission of Canada, *Study Paper on Obscenity* (December, 1972), p. 66. At pp. 131-134 of the study, there is a tabulation of replies to a survey of local police practices. Only in Ottawa, Ontario, which reported 248 warrants issued under section 160 in 1970, could the use of these warrants be termed frequent. In Montréal, by contrast, one warrant was reported issued in 1971-72, as opposed to 222 section 159 prosecutions.

493. *Nova Scotia Board of Censors* v. *McNeil*, [1978] 2 S.C.R. 662, at p. 691.

494. This viewpoint may indeed have certain limitations. As Laskin C.J.C. pointed out in his dissent (at p. 682), the focus on the form of a prohibition rather than its substance invites a legislature to attempt by prior restraint what it cannot do by defining an offence and prescribing *post facto* punishment. However, by the same token, the mere fact that legislation is concerned with a subject-matter that could be dealt with

constitutionally under the criminal law power does not mean that the legislation is itself criminal law.

495. See, for example, Mark M. Krotter, "The Censorship of Obscenity in British Columbia: Opinion and Practice" (1970), 5 U.B.C. L. Rev. 123.

496. W. A. McKean, "The War against Indecent Publications" (1965), 1 Otago L. Rev. 75.

497. 18 U.S.C. 1465.

498. *Customs Tariff*, R.S.C. 1970, c. C-41, s. 14. "Books, printed paper ... or representations of any kind of a treasonable or seditious, or of an immoral or indecent character" are prohibited under schedule C, No. 99201-1.

499. See text, *supra*, paras. 65-69.

500. See text, *supra*, Part One, para. 176.

501. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 Crim. L.Q. 29, at p. 36. This article portrays much of the history of gun control legislation in Canada.

502. See the memorandum prepared by the National Police Committee for the Protection of Citizens, appended to the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, First Session, Thirtieth Parliament, p. 43: 175.

503. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 84-87.

504. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 88 and 89.

505. *First Progress Report*, *supra*, note 192, p. 130.

506. See text, *supra*, paras. 46-50.

507. Friedland, *supra*, note 501, pp. 40-46.

508. *Explosives Act*, R.S.C. 1970, c. E-15.

509. *Re Thomson*, *supra*, note 73.

510. *Ibid.*, pp. 15-16.

511. *Attorney-General of Canada* v. *Pattison*; *Attorney-General of Canada* v. *Metcalfe* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.).

512. Metropolitan Toronto Police, *Search of Persons and Premises* (March, 1978), p. 4.

513. *Ibid.*, p. 2. While the Metropolitan Toronto Police Department's instruction materials include a restrictive interpretation of section 101, other forces' materials often simply recite the section itself, with its inherent ambiguities. In the *Progress Report* prepared for the Solicitor General, *supra*, note 192, it was noted that the researchers had found "one or two jurisdictions where subsection 101(2) has been

employed to facilitate searches of known or suspected criminals". (*Report*, p. 131).

514. See Recommendations 2, 7, 8, 9 and 46 in particular.

515. See text, *supra*, Part One, paras. 129-130.

516. A noted proponent of "internal controls" is Professor David Bayley of the University of Denver, whose paper "American, Japanese and Western European Systems of Accountability over the Police", as yet unpublished, was presented at the International Conference on Police Accountability at the University of British Columbia, January 30, 1980. See also, Bayley, "The Limits of Police Reform" in *Police and Society*, edited by D. Bayley (Beverley Hills: Sage Publications, 1977), p. 219.

517. See text, *supra*, Part One, para. 226.

518. In addition to challenging a search perceived to be illegal after the fact, an individual could try to prevent it either through physical obstruction or a court injunction: *Solloway Mills & Co.* v. *Attorney General of Alberta* (1930), 53 C.C.C. 306 (B.C. C.A.). In the former case, the alternative is both physically and legally risky; the latter is of limited effectiveness since it permits peace officers to return to search if they subsequently obtain proper authorization.

519. See text, *supra*, Part One, para. 97-100.

520. See, for example, "Charges of Mayhem on the Beat", *MacLeans*, March 15, 1982, p. 51.

521. *R.* v. *Coutellier, Cobb and Cormier*, unreported, June 16, 1977 (Qué. Sess. Ct.).

522. Weiler, *supra*, note 35, pp. 443-44.

523. James Spiotto, "The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule", [1973] 1 J.P.S.A.A. 36, at p. 47.

524. The information as to all civil and criminal proceedings initiated against R.C.M.P. members was obtained from the R.C.M.P.'s own national files by Commission research personnel. Only actions involving challenges to legality were taken into consideration. Thus, civil suits that involved, for example, claims for damages incurred during execution of a search or by virtue of detention of goods seized, were excluded from the study if the claims conceded, or refrained from questioning, the legality of the R.C.M.P. members' actions. The study covered all challenges made that resulted in the opening of an R.C.M.P. file at headquarters during the years 1978 and 1979.

525. *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (N.S. C.A.).

526. *Coutellier, Cobb and Cormier*, *supra*, note 521.

527. For an excellent discussion of complaint procedures, see Goldstein, *supra*, note 11, pp. 157-186.

528. The R.C.M.P. did not keep national files for complaints made against its members that did not involve civil or criminal proceedings. However, a study of complaints made against the force nation-wide was completed by its own Internal Affairs Branch in the winter of 1980. The study covered a six-month period ending on September 30, 1979, during which 1,042 complaints were received. Of these, 26 related to searches and 18 to seizures. The results of the study received by the Commission did not distinguish between searches executed with or without warrants or writs of assistance.

529. Spiotto, *supra*, note 523, p. 47.

530. Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police, *Report* (Ottawa: Information Canada, 1976), p. 50.

531. See, for example, Herman Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority" (1967), 58 Jour. of Crim. Law , Crimin. and Pol. Sc. 160, at pp. 167-168.

532. *Cave* v. *Mountain* (1840), 1 Man. & C. 257, 133 E.R. 330 (C.P.).

533. *Re Alder and The Queen* (1978), 37 C.C.C. (2d) 234 (Alta S.C.), at p. 252.

534. *Den Hoy Gin*, *supra*, note 215.

535. *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, [1964] 3 C.C.C. 381, at pp. 386-387.

536. For example, see the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 3; *The Justices and Magistrates Protection Act*, R.S.N.S. 1967, c. 157, ss. 2 and 3; and *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, ss. 4 and 5.

537. See *The Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 37; *The Provincial Court Act*, S.A. 1971, c. 86, s. 15(3); and *The Provincial Judges Act*, S.M. 1972, c. 61, s. 12.

538. Weiler, *supra*, note 35, p. 445.

539. *Ibid.*, p. 448.

540. See *supra*, note 524.

541. Spiotto, *supra*, note 523, p. 45.

542. *Ibid.*

543. *Ibid.*

544. Weiler, *supra*, note 35, p. 449.

545. A recent book on topic is Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada*, *supra*, note 146. See also Ericson, *supra*, note 10, p. 138.

546. [1971] S.C.R. 272, 293 *per* Martland J. This position has been codified in section 22 of the *Canada Evidence Act, 1982* (Bill S-33), introduced in the Senate and given first reading in Parliament on 18 November 1982.

547. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (Ont. Div. Ct.).

548. *Bergeron* v. *Deschamps* (1977), 33 C.C.C. (2d) 461 (S.C.C.).

549. *Re Black and The Queen* (1973), 13 C.C.C. (2d) 446 (B.C. S.C.).

550. *Re Alder and The Queen*, *supra*, note 533, p. 251.

551. *Re Model Power (A Division of Master Miniatures Ltd.) and The Queen*, unreported, October 1, 1979 (Ont. H.C.); affirmed January 25, 1980 (Ont. C.A.); leave to appeal denied March 11, 1980 (S.C.C.). *Re Atkinson and The Queen* (1978), 41 C.C.C. (2d) 435 (N.B. S.C.); *Re Barton* (1979), 60 A.P.R. 631 (N.B. Q.B.); *R.* v. *Pomerleau*, unreported, February 14, 1979 (Qué. C.A.).

552. *Capostinsky* v. *Olsen*, unreported, April 3, 1981 (B.C. S.C.).

553. *Re Butler and Butler and Solicitor General* (1981), 61 C.C.C. (2d) 512 (B.C. S.C.)

554. *Re Black and The Queen*, *supra*, note 549.

555. See, for example, *Elkins* v. *United States* (1964), 364 U.S. 206, at p. 217.

556. See, for example, *Stone* v. *Powell* (1976), 428 U.S. 465, at pp. 482 (*per* Powell J.) and 498 (*per* Burger C.J.).

557. See, for example, J. David Hirschel, *Fourth Amendment Rights* (Lexington: D.C. Heath, 1979).

558. Goldstein, *supra*, note 531, pp. 171-172.

559. *MacIntyre* v. *Attorney General of Nova Scotia*, *supra*, note 12.

560. Laycraft Inquiry, *supra*, note 238.

561. Pringle Report, *supra*, note 210.

562. See notes 399 and 400, *supra*.

563. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Police* (Washington: U.S. Government Printing Office, 1967), p. 34.

564. *First Progress Report*, *supra*, note 192.

565. *Ibid.*, p. 131.

566. *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14).

PART THREE:

SUMMARY

OF

RECOMMENDATIONS

Things, Funds and Information

1. To accord with modern techniques of acquiring and storing things and information, it should be specified that powers of seizure may authorize:

- **(a) taking photographs of a thing which is an "object of seizure";**
- **(b) obtaining records which are "objects of seizure", regardless of the physical form or characteristics of the storage of the records; and**
- **(c) acquiring control over funds which are "objects of seizure" in financial accounts.**

Objects of Seizure

2. "Objects of Seizure" means things, funds and information which are:

- **(a) takings of an offence;**
- **(b) evidence of an offence; or**
- **(c) possessed in circumstances constituting an offence.**

"Takings of an offence" means stolen property or other property taken illegally from the victim of an offence. It includes property into, or for which, takings of an offence originally in the possession of an individual have been converted or exchanged.

Persons Illegally Detained

3. In addition to their powers regarding "objects of seizure", peace officers should be empowered to search for and rescue persons detained in circumstances constituting an offence.

Exceptions to the Warrant Requirement

4. Unless otherwise specified, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. A warrant should not be required:

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Exceptions to the Warrant Requirement

4. Unless otherwise specified, peace officers should only be empowered to search for or seize "objects of seizure" with a warrant. A warrant should not be required:

(b) any weapon or other thing that could either assist the arrested individual to escape or endanger the life or safety of the arrested individual, the peace officer or a member of the public.

Where Delay Is Dangerous to the Life or Safety of Persons

9. Where a peace officer believes on reasonable grounds that:

(a) an "object of seizure" is to be found on a person or in a place or vehicle; and

(b) the delay necessary to obtain a warrant would result in danger to human life or safety,

he should be empowered to search for and seize the "object of seizure" without a warrant.

Searches of Vehicles where Delay Risks the Loss or Destruction of Objects of Seizure

10. Where a peace officer has arrested a person who is in control of, or an occupant of, a movable vehicle, and believes on reasonable grounds that:

(a) an "object of seizure" is to be found in the vehicle; and

(b) the delay necessary to obtain a warrant would result in the loss or destruction of the "object of seizure",

he should be empowered to search for and seize the "object of seizure" without a warrant.

Issuance of Warrants

11. A justice of the peace should be empowered to issue a warrant to search a person, place or vehicle if there are reasonable grounds to believe that the person, place or vehicle is carrying, containing or concealing an "object of seizure".

12. Except as authorized in the telephonic warrant procedures set out in Recommendation 19, the application for all search warrants should be an information in writing sworn under oath. The issuer

should be empowered to question the applicant to ascertain additional facts underlying the application. However, if such facts are relied upon in the adjudication of the application, they should be attested to on the face of the information.

Documentation

13. Standard statutory forms should be drafted so as to eliminate the problems of improvised drafting that currently exist. These forms, unlike the current Form 1, should truly guide the officer in setting out the details the law requires. "Legalese" should be rejected in favour of comprehensible language. Guidelines used by the police should stress the need for thoroughness on the information and warrant rather than on exclusively administrative documents.

Judicial Discretion and Refusal to Issue a Warrant

14. A peace officer applying for a warrant should be required to disclose on the information form any previous applications made with respect to the same warrant (*viz.* a warrant to search the same person, place or vehicle for "objects of seizure" related to the same or a related transaction).

The Test to Be Met

15. A peace officer applying for a warrant should not be required to reveal facts disclosing the identity of confidential sources. However, this policy should not permit warrants to be issued on the basis of applications that fail to meet the "reasonable ground" test.

16. Section 178.2 of the *Criminal Code* should be amended so as to make clear that peace officers are not precluded from disclosing facts obtained from an intercepted private communication in the course of search warrant applications.

The Issuer

17. The warrant issuing powers of the justice of the peace should not be viewed in isolation from his other judicial functions. Steps should

be taken to ensure the proper qualification and independence of officials empowered to exercise significant adjudicative duties under the *Criminal Code*. New provincial initiatives should be undertaken to examine the office of justice of the peace and either abolish or reorganize it where necessary.

The Participation of Crown Counsel

18. More use of Crown or private police counsel would improve the quality of applications for warrants. However, the Crown's participation in the process should remain discretionary. While issuers of warrants should remain free to request the Crown's participation in appropriate cases, the Crown should be a submitter rather than an adviser to the issuer.

The Telephonic Warrant

19. A telephonic warrant procedure, similar to that set out in the American Federal Rules, should be instituted in Canada. It should be available only when grounds exist to obtain a warrant under Recommendation 11 but resort to conventional procedure is impracticable. Safeguards should be implemented to ensure that a record of the proceedings is subsequently made available to persons affected, and that the warrant used by the officer is identical to that authorized by the issuer.

Execution of Warrants

20. Private individuals should continue to be entitled to apply for search warrants. Once the issuer has decided to authorize a search, however, the responsibilities of execution should lie entirely with peace officers. Peace officers should be empowered to bring into the place or vehicle to be searched any private individual whose presence is reasonably believed to be necessary to the successful execution of the warrant.

Which Peace Officer May Execute the Warrant?

21. It should be legally permissible for any peace officer within the territorial jurisdiction of the issuer to execute a search warrant.

Daytime or Night-time Execution

22. Warrants should authorize execution by day only, unless the applicant shows reasonable cause for allowing execution by night.

Deadline for Execution

23. A warrant should expire after eight days, but an applicant should be entitled to apply for a new warrant if grounds for search still exist after this period.

Scope of Search and Seizure with Warrant

24. A peace officer executing a search warrant should be empowered to search only those areas, within the places and vehicles or upon the persons mentioned in the warrant, in which it is reasonable to believe that the objects specified in the warrant may be found. A peace officer performing such a search should be empowered to seize, in addition to "objects of seizure" specified in the warrant, other "objects of seizure" he finds in plain view.

The Use of Force

25. The use of force should continue to be governed generally by the standards presently set out in subsection 25(1) of the *Criminal Code*, which recognize that a peace officer, if he acts on reasonable and probable grounds, is justified in using as much force as is necessary.

Unannounced Entry

26. In the absence of circumstances justifying either unannounced or forceful entry into private premises, a peace officer should be required to make a demand to enter in all cases. If an occupant does not comply with the demand within a reasonable time, the officer should be empowered to use force to gain entry.

Duties toward Individuals Affected by the Search or Seizure

27. Where a peace officer makes a search or seizure with a warrant, he should be required, before commencing the search or as

soon as practicable thereafter, to give a copy of the warrant to the person to be searched, or to a person present and ostensibly in control of the place or vehicle to be searched. A copy of the warrant should be suitably affixed within any place or vehicle that is unoccupied at the time of the search or seizure.

28. Where practicable, a person present and ostensibly in control of a place or vehicle should be entitled to observe the search.

29. If objects are seized in the course of a search, the individual affected should be entitled to receive an inventory of these objects on request. If the owner of the objects seized is known to be a different person from the individual whose place, person or vehicle is searched, he should be provided with an inventory without the necessity of a request. The extent of detail on the inventory should be that which is reasonable in the circumstances.

The "Plain View" Doctrine

30. If a peace officer, in the course of a lawful search or otherwise lawfully situated, discovers "objects of seizure" in plain view, he should be empowered to seize them without a warrant. In such cases, a post-search report should be filed, as specified in Recommendation 37.

Searches of Persons

31. A peace officer may search a person:

(a) named in a search warrant;

(b) found in a place or vehicle specified in a search warrant if:

(i) there is reasonable ground to believe that the person is carrying an object of seizure specified on the warrant; and

(ii) the issuer of the warrant has authorized the search of persons found in the place or vehicle on the face of the warrant; or

(c) pursuant to the powers of search without warrant set out in Recommendations 5-10.

However, no "medical examination" or mouth search may be conducted except as provided in Recommendations 32 and 33.

32. No activity involving the puncturing of human skin should be authorized under search and seizure law. A "medical examination" (*viz.* a sexually intimate search, examination of the naked body or probing of body cavities not involving puncturing the skin) should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) pursuant to a specific warrant naming the person to be examined;

(c) if performed by a qualified medical practitioner; and

(d) if conducted in circumstances respectful of the privacy of the person to be examined.

33. A search of the mouth of a person should be authorized only:

(a) in connection with an offence of a serious nature specified by Parliament;

(b) if performed in a manner not dangerous to human life or safety;

(c) on the condition that the peace officer performing the search complete a post-search report, as set out in Recommendation 37.

Search with Warrant

34. An issuer of a search warrant should be empowered to exclude persons from a search warrant hearing where it appears to him that the ends of justice will best be served by making such an order.

35. An individual affected by a search or seizure with warrant should be entitled to inspect the warrant and supporting information upon oath immediately after the execution of the warrant. Other persons should be granted access to these documents but should be subject to a prohibition against publishing or broadcasting their contents until:

(a) upon application by an individual affected, the prohibition is revoked by a superior court judge or judge as defined in section 482 of the *Criminal Code*;

(b) the individual affected is discharged at a preliminary inquiry; or

(c) the trial of the individual affected is ended.

36. If the release of either an information or warrant would be likely to reveal the existence of electronic surveillance activities, the issuer of the warrant, upon application by the Crown or a peace officer, should be empowered to obscure any telephone number mentioned on the document and replace it with a cypher. Similarly, if the identity of a confidential informant would be jeopardized, the peace officer or issuer should be empowered to obscure the name or characteristics of the informant and replace them with a cypher. In either case, upon so doing, the issuer should attest on the document that the only facts so obscured are the digits of a specific telephone number or name and characteristics of an informant, as the case may be.

Search without Warrant

37. A peace officer should be required to complete a post-search report in the following circumstances:

(a) where objects are seized without warrant;

(b) where objects not mentioned in a search warrant are seized after a search with warrant pursuant to Recommendation 24;

(c) where a search of a person's mouth is conducted, pursuant to Recommendation 33.

The report should include the time and place of the search and/or seizure, the reason why it was made and an inventory of any items seized. It should be available on request to an individual affected by the search or seizure described in the report.

The Unsuspected Party

38. Where a party in possession of "objects of seizure" is not suspected of being implicated in the offence to which the search relates, an officer executing the search should be required generally to request the party to produce the specified objects. The officer should be empowered to conduct the search himself if:

(a) the party refuses to comply with the request within a reasonable time; or

(b) there is reasonable ground to believe that a request will result in the destruction or loss of the specified objects.

Financial Accounts

39. Where "objects of seizure" are reasonably believed to be in a financial account, the police should be empowered to obtain a warrant to transfer the amount of the seizable funds to an official police account under judicial control. A temporary freezing order on a financial account should be made available where police officers seize financial records that are reasonably believed to contain information that will enable them to apply for a warrant to seize funds in the account. The freezing order should be of fixed duration and limited by the amount of the seizable funds. It should be obtainable from a superior court judge or a judge designated under section 482 of the *Criminal Code*, and subject to an immediate right on the part of the individual concerned to apply for its revocation.

Solicitor-Client Privilege

40. The sealing and application procedures set out in Bill C-21, proposed in 1978, should be instituted with two new provisions — the protection should extend to materials in possession of the client as well as the solicitor, and counsel for both the applicant and the Crown should have express rights of access to the documents at issue in the application.

Searches of the Press and Other Media

41. The press should have no special protections against unreasonable search and seizure, other than those conferred by the *Charter* and by these recommendations.

Surreptitious Intrusions

42. Modifying search and seizure procedures to accommodate surreptitious police intrusions would result in serious sacrifices of the protective features of these procedures. Absent compelling evidence of the need for such sacrifices, the modifications should not be made in the context of criminal or crime-related investigations.

Writs of Assistance

43. The writs of assistance under the *Narcotic Control Act*, *Food and Drugs Act*, *Customs Act* and *Excise Act* should be abolished.

Other Special Powers

44. The following special provisions should be abolished:

(a) bawdy- and gaming-house powers — section 181 of the *Criminal Code*;

(b) warrants for women in bawdy-houses — section 182 of the *Criminal Code*;

(c) special interrogation procedures for persons found in disorderly houses — section 183 of the *Criminal Code*;

(d) precious metals warrants — section 353 of the *Criminal Code*;

(e) powers to search for stolen timber — subsection 299(3) of the *Criminal Code*;

(f) powers to seize cocks in a cockpit — section 403 of the *Criminal Code*;

(g) powers to seize counterfeit money — section 420 of the *Criminal Code*;

(h) powers relating to narcotics and drugs — section 10 of the *Narcotic Control Act* and section 37 of the *Food and Drugs Act*.

Obscene Publications, Crime Comics and Hate Propaganda

45. Special warrant provisions for obscene publications, crime comics, and hate propaganda should be regarded as regulatory provisions rather than legitimate components of criminal procedure. Accordingly, if they are to be retained, they should be incorporated into regulatory legislation and removed from the *Criminal Code*.

Weapons

46. Powers to seize firearms currently authorized under sections 99 and 100 of the *Criminal Code* are subsumed in the Recommendations set

out above. Section 101 of the *Criminal Code* is not a valid mechanism for the enforcement of criminal law. However, it may serve legitimate objectives as a regulatory instrument of gun control. The section should be redrafted in this light so as to:

(a) tie the search and seizure sections more firmly to *in rem* confiscation provisions; and

(b) permit a search to be performed only when there is a reasonable belief that the person concerned is in possession, custody or control of a weapon.

Enforcing the Rules

47. A procedure should be instituted to implement the principle that illegally obtained evidence should not be admitted at trial, where its use as such would tend to bring the administration of justice into disrepute. The details of this procedure will be developed in the Working Paper on Post-Seizure Procedures.

48. Consideration should be given to establishing panels of judges and lawyers at provincial and local levels to monitor compliance with legal requirements for search warrant documents.

LES POUVOIRS DE LA POLICE: LES FOUILLES, LES PERQUISITIONS ET LES SAISIES EN DROIT PÉNAL

On peut obtenir ce document gratuitement en écrivant à:

Commission de réforme du droit du Canada
130, rue Albert, 7e étage
Ottawa, Canada
K1A 0L6

ou

Bureau 310
Place du Canada
Montréal (Québec)
H3B 2N2

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Document de travail 30

LES POUVOIRS DE LA POLICE: LES FOUILLES, LES PERQUISITIONS ET LES SAISIES EN DROIT PÉNAL

1983

Avis

Le présent document de travail constitue une tentative d'unification, de rationalisation et de réforme des pouvoirs de fouille, de perquisition et de saisie de la police dans l'application du droit pénal. La Commission désire connaître la réaction de tous les juristes, des organes législatifs et du public en général, qui voudront bien lui faire part de leurs commentaires. La Commission présentera son rapport au Parlement, à une date ultérieure, après avoir tenu compte de la réponse du public au présent document de travail.

C'est avec gratitude que la Commission recevra tout commentaire qui lui aura été envoyé à l'adresse suivante:

Secrétaire
Commission de réforme du droit du Canada
130, rue Albert
Ottawa, Canada
K1A 0L6

La Commission

Francis C. Muldoon, c.r., président
Réjean F. Paul, c.r., vice-président
Louise D. Lemelin, c.r., commissaire
Alan D. Reid, commissaire
Joseph Maingot, c.r., commissaire

Secrétaire

Jean Côté, B.A., B.Ph., LL.B.

Coordonnateur, procédure pénale

Calvin A. Becker, B.A., LL.B., LL.M., Ph.D.

Expert-conseil principal

Lee S. Paikin, B.A., LL.B., LL.M.

Experts-conseils et collaborateurs

Tanner Elton, B.A., LL.B., LL.M.
G. Norman Jones, B.A., M.A.
Sharon Moyer, B.A., M.A.
Louise Savage, B.A., M.A.
Clifford Shearing, B.Sc., M.A., Ph.D.

Remerciements

Les membres actuels de la Commission désirent témoigner leur gratitude à leurs prédécesseurs: Monsieur le juge Antonio Lamer, qui, en sa qualité de président de la Commission de réforme du droit, a su identifier le besoin urgent de réforme qui existait dans le domaine des fouilles, des perquisitions et des saisies et, à cette fin, a consacré toute son énergie et sa renommée à la tâche parfois délicate qui consistait à obtenir et à conserver l'appui de divers procureurs généraux provinciaux, des juges des tribunaux provinciaux et des forces de police. La Commission désire également remercier Monsieur le professeur Jean-Louis Baudouin, c.r., et Monsieur le juge Jacques Ducros, successeurs de Monsieur le juge Lamer et responsables de la section de recherche sur la procédure pénale, d'avoir assuré la continuité et la coordination du projet.

La Commission remercie également l'Association canadienne des chefs de police et son Comité des amendements législatifs, de même que les nombreux agents de police fédéraux, provinciaux et municipaux, qui, avec patience et franchise, nous ont permis d'étudier leurs méthodes de fouille, de perquisition et de saisie.

Pour l'aide qu'ils ont apportée dans la détermination de la légalité des mandats de perquisition qui leur ont été soumis, la Commission tient à remercier les juges qui ont fait partie du comité réuni par Monsieur le juge Ducros: Monsieur le juge Edward Bayda de la Cour d'appel de la Saskatchewan, Monsieur le juge James Hugessen, juge en chef adjoint de la Cour supérieure du Québec, Monsieur le juge Benjamin Greenberg et Monsieur le juge Jean-Guy Boilard, tous deux de la Cour supérieure du Québec, Monsieur le juge John O'Driscoll de la Cour suprême de l'Ontario, Monsieur le juge Peter Richard de la Cour suprême de la Nouvelle-Écosse, Monsieur le juge Kenneth Fawcus, anciennement de la Cour suprême de la Colombie-Britannique, ainsi que Monsieur le juge Benjamin Hewak de la Cour du Banc de la Reine du Manitoba.

Préface

Lorsque la Commission a entrepris son étude des pouvoirs de la police en matière de fouilles, de perquisitions et de saisies en 1978, peu de gens voyaient la nécessité d'une réforme des règles de droit dans ce domaine.

Certes, l'on reconnaissait que les pratiques de la police n'étaient pas toujours conformes aux exigences de la loi, et que dans l'exercice de leur pouvoir discrétionnaire, les officiers de justice chargés de la délivrance des mandats de perquisition agissaient parfois de façon moins «judiciaire» que ne l'exigeait leur charge. Toutefois, on nous a affirmé que rien ne justifiait une étude approfondie des règles de droit en matière de fouilles, de perquisitions et de saisies, et encore moins une réforme fondamentale.

Au soutien de cette affirmation, on a attiré notre attention sur la rareté des décisions judiciaires dans ce domaine, tant au civil qu'au criminel. D'après cette jurisprudence, bien sûr, les problèmes liés aux fouilles, aux perquisitions et aux saisies étaient ponctuels plutôt que systématiques : ils étaient imputables à l'exercice de ces pouvoirs dans des circonstances données, plutôt qu'à la nature même de ces pouvoirs. Dans ces conditions, le besoin de réforme semblait nettement plus pressant dans d'autres domaines du droit.

Quant à nous, nous étions enclins à soupçonner que les problèmes en matière de fouilles, de perquisitions et de saisies étaient beaucoup plus fondamentaux que le non-respect, dans la pratique, d'un régime par ailleurs satisfaisant. Nos recherches préliminaires avaient révélé l'existence d'un nombre assez déconcertant de pouvoirs de fouille, de perquisition et de saisie en matière criminelle, auxquels s'ajoutaient les divers pouvoirs de même nature que conféraient les autres lois fédérales, sans parler des pouvoirs prévus par les lois provinciales. Il semblait presque impossible qu'un éventail aussi vaste de pouvoirs ne comporte pas une part importante d'incertitude. Si tant est que l'exigence de certitude découlant du principe de la suprématie du droit fût respectée dans chaque cas

particulier, la prolifération dans tous les azimuts des pouvoirs de fouille, de perquisition et de saisie ne pouvait manquer de rendre l'ensemble de ces pouvoirs pour ainsi dire incontrôlable, et partant, fort aléatoire, tant pour le public que pour les personnes chargées de l'application de la loi.

À l'incertitude qu'impliquent les grands nombres s'ajoutent, bien entendu, les incertitudes des diverses justifications et règles de procédure. Même à l'intérieur du *Code criminel*, les pouvoirs de fouille et de perquisition variaient de façon marquée, la légalité de leur exercice étant soumise, suivant les cas, à diverses justifications et à divers critères de forme, de fond et de preuve. À la vue d'un ensemble aussi hétéroclite de pouvoirs, une tentative d'unification et de rationalisation des règles du droit pénal en matière de fouilles, de perquisitions et de saisies nous a semblé indispensable.

Avant de nous lancer dans cette tâche, nous avons cherché à savoir si les pouvoirs, de même que leur caractère discrétionnaire, établis par les règles de droit en la matière posaient des problèmes en pratique. Nous avons pu constater que même si ce système, qui nous semblait très enchevêtré, ne péchait pas par excès de simplicité, les officiers de justice et les policiers expérimentés arrivaient tout de même à s'y retrouver.

Il serait fastidieux de décrire les méthodes que nous avons utilisées pour examiner la pratique actuelle en matière de fouilles, de perquisitions et de saisies. Qu'il nous suffise de dire que nous avons étudié en profondeur l'usage des mandats de perquisition, des mandats de main-forte et des pouvoirs de perquisition sans mandat. En outre, notre étude n'a fait que confirmer nos appréhensions initiales concernant l'inobservation des exigences de la loi dans l'exercice des pouvoirs de fouille, de perquisition et de saisie par la police. Toutefois, force nous a été de constater que les discordances entre la théorie et la pratique étaient en grande partie imputables à la complexité et à l'incohérence des règles de droit régissant ces pouvoirs.

Cependant, il va sans dire que l'inobservation des règles ne pouvait dans tous les cas être excusée aussi facilement. Quoi qu'il en soit, le problème de la complexité et de l'incohérence du système juridique appelait une solution évidente : l'unification et la rationalisation des divers pouvoirs de fouille, de perquisition et de saisie existant en common law, dans le *Code criminel*, et dans certaines lois connexes comme la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*. Notre objectif était donc de créer un seul

système complet et exhaustif de normes et de règles de procédure régissant toutes les fouilles, les perquisitions et les saisies en matière criminelle.

Mais encore fallait-il déterminer la nature de ces critères et de ces règles de procédure. Nous avons pris comme point de départ le critère des motifs raisonnables, mettant l'accent sur le caractère judiciaire et la spécificité des mécanismes en cause. Les règles de procédure pouvaient désormais être élaborées à partir de ces critères. C'est au regard de la *Charte canadienne des droits et libertés* et des garanties qu'elle contient à l'encontre des fouilles, des perquisitions et des saisies abusives, que nous avons fait du critère des motifs raisonnables la pierre angulaire du système de justifications et de règles de procédure liées à l'exercice par la police des pouvoirs de fouille, de perquisition et de saisie. À ce propos, il serait fort juste de dire que nos recommandations ne sont en fait qu'une explicitation du critère des motifs raisonnables qui sous-tend le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives, sanctionné par les dispositions de l'article 8 de la *Charte*.

En somme, nos recommandations de réforme reposent sur trois principes directeurs. Premièrement, l'ensemble disparate de pouvoirs de fouille, de perquisition et de saisie que l'on retrouve actuellement dans les enquêtes en matière criminelle et dans les matières connexes, devrait être remplacé par un système unique, complet et exhaustif. Deuxièmement, si ces pouvoirs devaient être véritablement conformes aux dispositions de la *Charte canadienne des droits et libertés*, les motifs de leur exercice devraient, de façon systématique, être jugés raisonnables par un officier de justice intervenant avant l'exercice du pouvoir et sur la foi d'une dénonciation assermentée et spécifique. Troisièmement, les exceptions à la règle générale voulant que les perquisitions doivent être autorisées par un mandat devraient être délimitées avec précision, de façon que les pouvoirs de fouille et de perquisition sans mandat ne puissent être exercés que dans des situations d'urgence déterminées, ou qu'avec le consentement explicite de la personne en cause.

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CHAPITRE UN

Introduction

1. Le présent document de travail est divisé en deux parties. La première est consacrée à une analyse des règles relatives aux perquisitions et aux saisies en droit criminel, de leur évolution historique et de la façon dont elles sont mises en pratique. La seconde présente des propositions précises sur la réorganisation et la modification de certains aspects de ce secteur du droit.

2. Il existe bien sûr des liens entre ces deux sujets, particulièrement sur les mécanismes procéduraux des perquisitions et des saisies. Il est nécessaire, par exemple, pour parvenir à des propositions intelligentes sur la question des fouilles personnelles, d'étudier le droit actuel, son évolution, et la façon dont il fonctionne en pratique. Toutefois, insister tout d'abord sur les détails de ces mécanismes risquerait de faire perdre la vue générale de la question. C'est pourquoi nous avons préféré étudier dans une perspective d'ensemble les caractéristiques des dispositions actuelles sur les perquisitions et les saisies, ainsi que les problèmes qui s'y rattachent.

3. Il s'agit là d'une tâche complexe. Il n'est pas facile en effet de mettre en ordre les diverses dispositions touchant les perquisitions et les saisies pour en dégager une vue d'ensemble. Dans l'ensemble de la procédure criminelle, ce domaine particulier est en effet spécialement déroutant par sa subtilité et ses particularismes. Prenons par exemple le cas des mandats de perquisition. En plus de l'article 443, qui autorise de façon générale les perquisitions visant des objets reliés à des infractions, le *Code criminel* contient aussi des dispositions traitant expressément des armes à feu, des publications obscènes, des histoires illustrées de crime, des choses et des personnes se trouvant dans des maisons de désordre, de la propagande haineuse et des métaux précieux[1]. En dehors du *Code*,

mais dans des domaines reliés à l'application du droit criminel, on trouve également des régimes virtuellement identiques instaurés par la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*[2]. Il existe enfin neuf autres types de mandats créés par législation fédérale[3].

4. La complexité de ce domaine ne se limite pas là. En fait, le mandat ne constitue pas la principale méthode d'autorisation des perquisitions et des saisies dans les lois modernes, même s'il joue un rôle prédominant dans le *Code*. Le pouvoir de perquisition et de saisie sans mandat existe par exemple pour certaines infractions relatives aux armes, au bois illégalement détenu, aux combats de coqs et à la monnaie contrefaite. L'importance du mandat a aussi diminué dans d'autres lois fédérales. Il existe en effet un total de quatre-vingt-deux dispositions fédérales, y compris la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*[4], qui confèrent à des fonctionnaires désignés le pouvoir d'effectuer une perquisition sans mandat. La survivance de pouvoirs particuliers aux mandats de main-forte vient encore compliquer le domaine des perquisitions et des saisies en vertu des lois sur les stupéfiants et drogues. Outre ces pouvoirs légaux, l'application du droit pénal repose dans une large mesure sur les règles de common law autorisant les perquisitions sans mandat lors d'une arrestation et les perquisitions «de consentement».

5. La prolifération de ces pouvoirs est apparue petit à petit au cours des trois siècles derniers. Le législateur a eu tendance lorsque le besoin s'en faisait sentir, à établir un nouveau pouvoir de perquisition, et à le rattacher à une disposition légale précise. De ce fait, le pouvoir de perquisition et de saisie a été considéré dans une perspective individuelle, comme un simple accessoire de ces dispositions législatives, et non dans une perspective générale comme la manifestation d'une catégorie de pouvoirs. En ce sens, les règles de procédure qui régissent la perquisition ont suivi la tradition du droit criminel anglais; elles ne sont pas le résultat d'une évolution mais plutôt d'une accumulation.

6. Au Canada, aucune véritable tentative d'analyse globale des lois relatives aux perquisitions et saisies n'est venu freiner le processus de ce développement. La préparation du *Code Criminel* de 1892 demeure sans doute la démarche la plus remarquable en ce sens. Encore doit-on admettre que cet effort tient davantage d'une consolidation des lois existantes que de leur réexamen critique. De toute façon, le fouillis du droit qui existait il y a quatre-vingt dix ans est encore pire aujourd'hui. Il est donc plus que temps d'examiner de façon globale l'ensemble des pouvoirs de perquisition et des pouvoirs

de saisie en droit criminel actuel. C'est là le but principal de la première partie de ce document de travail.

7. Pour décrire la situation actuelle, dans cette première partie, trois types d'analyse ont été utilisés: l'analyse juridique, l'analyse historique et l'analyse empirique. Les analyses juridique («Quel est le droit?») et historique («Comment est-il parvenu à son état actuel?») sont présentées ensemble au deuxième chapitre. Cette présentation permettra déjà de faire certaines constatations sur la cohérence et la viabilité des règles, et sur les tendances qui ont marqué leur évolution. Le portrait ne serait cependant pas complet sans une perspective empirique («Comment le droit est-il mis en pratique?»). Sans elle, en effet, les conclusions que l'on pourrait en tirer manqueraient d'utilité pratique.

8. Avant de décrire la situation actuelle, il est cependant utile de bien comprendre la signification des mots clés de cette étude. Qu'est-ce qu'une «fouille», une «perquisition», une «saisie» et un «mandat»? La réponse à ces questions peut sembler évidente. En fait, ces mots sont souvent utilisés de façon impropre. Ainsi le mandat de main-forte a souvent été décrit comme un véritable «mandat» alors qu'en réalité il n'en a aucunement le caractère. La définition ponctuelle de ces concepts de base permet plus de précision. Elle permet aussi et surtout de dégager des critères de base facilitant la comparaison entre les dispositions existantes et celles qui sont proposées. Connaître la signification de ces concepts est une étape préliminaire de l'appréciation critique des lois qui s'y rattachent.

I. Les perquisitions et les saisies

9. Les mots «perquisitions» et «saisies» ne sont pas définis au *Code criminel*. Cette omission peut sembler curieuse, mais l'explication est facile à trouver. Dans la perspective du *Code criminel* et d'autres lois semblables, ces expressions ne désignent pas des *actes* mais bien des *pouvoirs*, se rattachant à certains comportements. Ceux-ci ne sont pas décrits dans des définitions légales, mais plutôt dans deux types de dispositions qui sont complémentaires: les règles générales concernant le comportement de la police dans l'exécution de ses fonctions et les règles spécifiques

destinées à autoriser et régir les perquisitions et les saisies. Ainsi, lorsqu'un agent de la paix perquisitionne pour trouver une arme à feu et effectue une saisie, ses pouvoirs sont restreints à la fois par l'article 25 du *Code*, qui permet l'emploi de la force raisonnable dans l'application de la loi, et par certaines dispositions spécifiques des articles 99, 100 et 101, qui touchent les modalités de la saisie, les objets qui peuvent être saisis, et la disposition de ceux-ci, une fois la saisie effectuée.

10. Ces dispositions suffisent sans doute à établir les mécanismes généraux du pouvoir de perquisition et de saisie. Elles ne permettent pas toutefois de caractériser ou d'identifier ce pouvoir. Pour ce faire, il convient plutôt de replacer ces pouvoirs dans un contexte plus large, et de s'interroger sur leur signification, leur effet, leur nécessité. Le présent document de travail est fondé sur la définition suivante: **Les pouvoirs de perquisition et de saisie sont des pouvoirs permettant une atteinte aux droits d'une personne, pour obtenir ou s'assurer la possession d'objets, d'argent ou de renseignements préexistants.**

A. Les perquisitions et saisies en tant qu'atteintes à la vie privée

11. La perquisition et la saisie au sens large et populaire du terme, sont des actes quotidiens. Tous les jours, il nous arrive de chercher des objets, de les prendre, de les transporter d'un endroit à un autre. Le droit n'intervient que si ces actes portent atteinte au droit reconnu d'une autre personne et répond alors généralement par une condamnation de ceux-ci en en faisant un crime ou un délit, et en les assortissant de sanctions appropriées.

12. À ce premier stade, les actes posés par des agents de police ne se distinguent pas de ceux qui sont faits par d'autres personnes. La distinction apparaît plutôt par le biais d'exceptions spécifiques aux normes générales d'interdiction. Comme le soulignait un auteur:

> [TRADUCTION]
> Ni l'agent de police, ni personne d'autre ne peut légalement, toutes choses étant égales, commettre des voies de fait contre une autre personne, l'emprisonner, entrer chez elle ou saisir ses biens, parce qu'un tel comportement constitue une atteinte à ses droits personnels, ou à son droit de propriété. En fait, dans le premier cas, il y a aussi

> perpétration d'une infraction criminelle. Le droit pour cette raison a élaboré des règles justifiant l'arrestation, l'entrée et la saisie dans certains cas. Ces pouvoirs constituent une exception aux dispositions plus générales relatives aux crimes et aux délits[5].

C'est donc dans ce sens que les règles des perquisitions et des saisies confèrent des pouvoirs. Plus spécifiquement, elles confèrent des pouvoirs *exceptionnels* de faire ce qui serait interdit dans des circonstances ordinaires.

13. Il est donc crucial pour la police de connaître les limites exactes de ces pouvoirs puisque l'agent qui les dépasse même à la poursuite d'objectifs légitimes contrevient à la loi[6]. Comme l'agent qui outrepasse ses pouvoirs excède les limites de ses devoirs, la loi ne peut lui fournir de protection particulière contre ceux qui lui résistent. L'occupant d'un lieu privé qui empêche physiquement un agent de perquisitionner sans autorisation valable est donc dans la même situation juridique que celui qui résiste à un intrus[7].

14. La portée de ces pouvoirs exceptionnels est aussi d'une grande importance pour la société dans son ensemble. Les autres droits avec lesquels ils entrent en conflit sont en effet parmi les droits les plus fondamentaux des citoyens dans une démocratie libérale: l'inviolabilité et la dignité de la personne, le concept du droit à la vie privée, la sécurité des biens et la libre expression. Aux termes de l'article 12 de la *Déclaration universelle des droits de l'homme*, par exemple, «nul ne sera l'objet d'immixtion arbitraire dans sa vie privée, sa famille, son domicile ou sa correspondance[8]». Par ailleurs, les immixtions reliées aux perquisitions et saisies sont visées de façon spécifique à l'article 8 de la *Charte canadienne des droits et libertés*:

> Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives[9].

Étant donné l'importance attribuée au droit individuel menacé, il est essentiel de restreindre les règles des perquisitions et saisies aux cas où d'autres intérêts justifient véritablement cette atteinte.

15. La question fondamentale à laquelle il faut donc d'abord pouvoir répondre pour élaborer une théorie du pouvoir d'atteinte à la vie privée que représente le pouvoir de perquisition et de saisie est celle-ci: Quels sont les intérêts concurrents qui peuvent justifier une atteinte à des droits aussi essentiels? La réponse à cette question en amène d'autres. Quelles sont les procédures qui doivent être instituées pour autoriser et contrôler cette atteinte? Quelles sont les contraintes qui doivent être imposées aux personnes qui s'y livrent?

16. Ces questions peuvent, bien entendu, s'appliquer à l'ensemble du domaine des interventions gouvernementales dans la vie des citoyens. De nos jours, au Canada, sont monnaie courante les perquisitions et saisies qui constituent des atteintes à la vie privée et qui visent à mettre en œuvre des programmes de réglementation économique, des textes législatifs sur l'hygiène et la sécurité ou des procédures administratives telles que les directives en matière d'impôt sur le revenu, et auxquelles tous les citoyens sont à un certain degré tenus de se soumettre. L'analyse en profondeur de l'éventail de ces atteintes constitue une tâche importante et considérable[10]. La portée de la présente étude est cependant plus restreinte. Seules y seront analysées les atteintes qui ont trait à une fonction précise de l'État (sans doute l'une de ses plus délicates et certainement l'une des plus anciennes): l'application du droit pénal.

B. Les perquisitions, les saisies et les arrestations

17. L'exercice du pouvoir de perquisition et de saisie, ainsi que du pouvoir relatif à l'arrestation, représente sans doute l'atteinte la plus manifeste de l'application du droit pénal. Contrairement à certaines autres atteintes portant sur des libertés individuelles telles que la détention préventive ou l'imposition de la sentence, ces pouvoirs peuvent en effet être exercés dans la vie de tous les jours: dans la rue, dans les maisons, au travail, même dans les véhicules. La perquisition, la saisie ou l'arrestation sont souvent les premières manifestations d'une série d'atteintes qui jalonnent le cours de la procédure pénale, et marquent aussi le premier contact entre le suspect et la justice. De plus, l'exercice de ce pouvoir peut fort bien être le prélude à l'exercice d'un autre pouvoir; une fouille personnelle peut être effectuée à la suite d'une arrestation, tout comme une arrestation peut suivre la saisie de pièces à conviction.

18. Étant donné les caractéristiques communes à ces manifestations des pouvoirs policiers et les liens qui les unissent, nous devons tenter de les distinguer les unes des autres. La distinction adoptée dans le présent document de travail repose sur les buts poursuivis par les deux pouvoirs. Alors que l'arrestation est effectuée dans le but de s'assurer la maîtrise d'une personne, les perquisitions et les saisies visent principalement à obtenir des objets, de l'argent ou des renseignements.

19. Certains peuvent penser que cette distinction est superflue. Une arrestation et une perquisition ne paraissent-elles pas en soi deux choses différentes? Pas nécessairement! C'est ainsi, qu'au stade initial d'une atteinte, une perquisition pour retracer un individu que la police veut arrêter peut être, en pratique, impossible à distinguer d'une perquisition visant des objets que la police veut saisir. Les agents de la paix entrent dans les lieux, parfois par la force, et explorent ceux-ci pour y trouver la personne ou la chose qui fait l'objet de l'enquête[11].

20. La distinction peut aussi être difficile à faire lorsque l'atteinte ne vise pas des lieux, mais porte sur la personne. Dans l'affaire *Scott*, les faits suivants avaient été présentés à la Cour d'appel fédérale:

> L'intimé, attablé en compagnie d'autres personnes, venait de lever son verre et de prendre une gorgée de bière, lorsque l'appelant, le sergent Siddle, accompagné du gendarme Blaney, tous deux de la Gendarmerie royale du Canada, arrivé quelques instants plus tôt, saisit l'intimé à la gorge de sa main gauche et, de sa main droite, lui prit les cheveux et lui renversa la tête en arrière de sorte que son visage était orienté vers le plafond et sa tête maintenue par le bras droit de Siddle[12].

Quelle était la situation? Pour le juge de première instance, l'arrestation avait débuté avec l'application d'une pression sur la gorge de l'appelant et il conclut que celle-ci avait été faite sans justification. Les juges de la Cour d'appel, eux, ne cherchèrent qu'à déterminer si les pouvoirs de perquisition et de saisie conférés par la *Loi sur les stupéfiants* justifiaient cette atteinte aux droits de l'appelant. Le juge Thurlow «d'après la preuve, ne [voyait] pas comment on peut considérer qu'il s'agit d'une arrestation[13]».

21. Ce genre d'exemple démontre l'inutilité et le danger qu'il y a de tenter de qualifier les actions policières «d'arrestation», de «perquisition» ou de «saisie» en se fondant sur leurs seules caractéristiques phénoménologiques. Celles-ci ne permettent de déterminer que la nature de l'atteinte: une atteinte portant sur la personne et donc constituant des voies de fait ou une entrée illégale dans des lieux. Les différences significatives entre les diverses catégories de pouvoirs policiers ne peuvent être appréciées qu'en se rappelant que ces pouvoirs visent à exempter la police de l'application des règles générales protégeant l'individu contre ce genre d'atteintes. Ces exceptions, à leur tour, doivent être justifiées. Les différences essentielles entre l'exercice des pouvoirs de perquisition, de saisie et d'arrestation ne se trouvent pas dans la forme de l'atteinte, mais plutôt dans la justification qui en est fournie.

En d'autres termes, les pouvoirs de perquisition, de saisie et d'arrestation apportent des réponses variées à la question suivante: «quel intérêt ou quel but poursuit l'atteinte en question?»

22. L'"American Law Institute" dans son *Model Code of Pre-Arraignment Procedure* donne une définition de l'expression «fouille et perquisition». Nous en reproduisons certains extraits:

> [TRADUCTION]
> Toute atteinte, autre qu'une arrestation, commise par un agent avec une apparence de droit, à l'intégrité physique d'une personne, ou portant sur ses biens ou sur sa vie privée, et qui vise à se saisir de personnes ou d'objets ou à obtenir des renseignements par l'inspection ou la surveillance....[14]

Cette définition donne à penser qu'une fouille ou une perquisition constitue en réalité une action préliminaire, une démarche préalable à la réalisation de l'objectif ultime, qui est la saisie, ou plus exactement, que le but de la fouille ou de la perquisition est de trouver quelque chose. Cette chose trouvée, le but de la saisie elle-même devient pertinent.

23. Le même texte donne la définition suivante de la saisie:

> [TRADUCTION]
> Le fait pour un agent de se saisir d'une personne ou d'une chose ou d'obtenir des renseignements par une perquisition ou avec une apparence de droit; ...[15]

Vue dans une perspective séquentielle, la saisie représente l'acquisition du contrôle physique de l'objet. À cet égard, la saisie est donc analogue à l'arrestation. Comme le faisait remarquer un auteur,

> [TRADUCTION]
> [l]a police «saisit» des êtres humains, aussi bien que des objets animés et inanimés .... L'arrestation d'une personne et la saisie d'un objet sont des activités parallèles qui peuvent être ou ne pas être accessoires à une perquisition[16].

C'est donc dans l'objet de la détention que repose la distinction entre le but poursuivi par la saisie ou l'arrestation: un objet inanimé (qui peut être, à notre sens, une chose, des fonds ou un renseignement) dans le premier cas, une personne dans le second[17].

24. Une exception à cette distinction existe lorsqu'on se saisit de *A* pour le délivrer de *B* qui le détient. Cet acte ressemble de façon superficielle à une arrestation. Toutefois, il en est différent parce que son but premier n'est pas de s'assurer de la détention de *A*. L'aspect coercitif de l'acte est plutôt dirigé contre *B*, tout comme si celui-ci

était le gardien non pas d'une personne mais d'un objet recherché. De tels actes de secours se rapprochent donc davantage des saisies que des arrestations. Cela pourrait nous inciter à étudier le pouvoir de secours dans le cadre du présent document de travail, mais nous maintenons que par souci de clarté, ce pouvoir doit être considéré comme distinct du pouvoir de perquisition et de saisie.

25. Deux autres questions doivent être clarifiées. En premier lieu, il est important quant à l'objet de la détention, d'être conscient de la distinction entre le but principal de l'exercice du pouvoir et les étapes qui peuvent être nécessaires pour réaliser ce but. Pour fouiller une personne, par exemple, il est nécessaire de se saisir d'elle pour la durée de la fouille. Ce fait peut fort bien satisfaire aux critères traditionnels de l'arrestation élaborés dans l'arrêt *Whitfield*[18]: toucher à une personne dans le but de la détenir. En raison de son caractère accessoire, toutefois, ce type d'atteinte à la vie privée est assez souvent perçu comme une privation de liberté qui ne constitue pas une arrestation.

26. Aux États-Unis, ce problème a souvent été résolu en classant la détention nécessitée par une perquisition comme un «simple contrôle». Cette expression est aussi utilisée par les forces policières canadiennes pour décrire certains actes comme la vérification auprès d'un conducteur du certificat d'immatriculation et d'assurance de son véhicule. Une dernière précision d'ordre sémantique: l'ordre de rester immobile (en anglais "freezing") lors d'une perquisition effectuée pour trouver des stupéfiants a été intégré au vocabulaire anglais des fouilles, perquisitions et saisies dans l'arrêt *Levitz* v. *Ryan*[19]. Il reste à voir, cependant, à la lumière de la *Charte*, si ces «simples contrôles» et «ordres de rester immobile» seront considérés comme une arrestation ou une détention ou si on leur accordera un statut juridique distinct. D'une façon plus générale, il reste aussi à savoir si les tribunaux canadiens modifieront, et dans quelle mesure, le principe selon lequel l'attribution de certains devoirs aux agents de la paix implique qu'ils ont aussi les pouvoirs nécessaires et accessoires à l'accomplissement de ces devoirs. Nous n'avons pas jugé nécessaire de tenter de répondre à ces questions dans le cadre du présent document. Nous avons plutôt cherché à préciser quelles atteintes accessoires devraient être associées à certains pouvoirs particuliers de fouille, de perquisition et de saisie.

27. En deuxième lieu, l'établissement d'une différence entre perquisition et saisie sur la base des buts poursuivis n'emporte pas nécessairement la présence d'une distinction basée sur des justifications distinctes selon le stade de l'atteinte. Souvent, les deux

stades forment plutôt un continuum. Comme nous l'avons mentionné, le but de la perquisition réside en effet dans la saisie qui doit suivre. Cependant, l'affaire *Colet*[20], décision récente de la Cour suprême du Canada, démontre la réticence du pouvoir judiciaire à inférer de l'existence d'un pouvoir de saisie celle d'un pouvoir de perquisition. De plus, les policiers ont dans certains cas le droit de saisir des objets susceptibles de constituer des pièces à conviction, qu'ils ne s'attendaient peut-être pas à trouver au moment d'entreprendre les perquisitions[21]. Il convient donc d'être précis dans l'étude et la formulation de ces pouvoirs. **Pour les fins du présent document, nous considérons la perquisition comme le pouvoir de porter atteinte aux droits d'une personne en vue de découvrir un objet, et la saisie comme le pouvoir de prendre cet objet.**

C. Les perquisitions, les saisies et la surveillance

28. Le pouvoir de perquisition et de saisie conféré aux agents de police est en général justifié par l'importance pour l'État de détenir ou d'obtenir certains objets ou certains renseignements. Il ne représente cependant pas les seules activités pouvant être exercées dans la poursuite d'un tel but. La recherche de renseignements, particulièrement à notre époque, peut aussi se faire par voie de surveillance.

29. La distinction entre surveillance, perquisition et saisie est loin d'être évidente. À vrai dire, peu a été accompli dans la recherche de définitions permettant de les distinguer. Nous adopterons pour les fins de la présente étude la distinction suivante: **alors que le but de la perquisition et de la saisie est d'obtenir et de détenir des objets ou des renseignements qui existent déjà lorsque le pouvoir est exercé, le but de la surveillance est de découvrir des renseignements en l'exerçant.** Une étude des aspects juridique et technologique de la question aidera à comprendre cette distinction.

30. On peut, de nos jours, considérer la perquisition et la saisie comme des pouvoirs visant la collecte des renseignements. À l'origine cependant elles étaient considérées exclusivement comme un moyen d'obtenir des objets. Le mandat de perquisition du common law, décrit en détail plus loin, n'a été créé que pour permettre de récupérer des biens volés de celui qui les possédait illégalement. La gamme des objets recherchés a été élargie de façon

graduelle par la loi, et ce n'est qu'assez récemment que les tribunaux ont reconnu l'existence d'un droit de saisie dans des cas autres que ceux fondés sur un droit de propriété sur l'objet. Dans l'affaire *Entick* v. *Carrington*, une cause anglaise de 1765 faisant encore jurisprudence, la règle de common law a été clairement énoncée: l'État n'a pas le droit de saisir des objets pour un simple motif de recherche de preuves[22]. Cette conception a été abandonnée au Canada lors de la codification de 1892. Elle est cependant restée vivace aux États-Unis et en Grande-Bretagne pendant beaucoup plus longtemps[23].

31. L'obtention d'objets implique une progression précise d'événements: l'entrée dans le lieu de la perquisition, la constatation de la présence des objets recherchés, et leur appropriation. L'éventualité d'une prolongation de l'atteinte à la vie privée, pour permettre d'observer d'autres faits n'a pas été reconnue comme un aspect valide du pouvoir de perquisition. Même après que la recherche de preuves eut été reconnue comme un objectif légitime, les tribunaux qui ont interprété les dispositions ayant trait aux perquisitions et aux saisies, se sont intéressés, non pas aux renseignements en eux-mêmes, mais plutôt aux renseignements que pouvaient fournir les objets. Cette position a été maintenue encore en 1947 dans l'affaire *Bell Telephone* où un mandat de perquisition visant à chercher et observer un certain appareil téléphonique a été annulé. Selon le juge McRuer, [TRADUCTION] «il est fondamental que le but du mandat de perquisition est de mettre en sûreté des objets qui par eux-mêmes seront pertinents à l'égard d'une prétention à prouver, et non pas de s'assurer la possibilité de faire des observations relativement à l'utilisation des objets, et d'obtenir ainsi des preuves[24]».

32. À l'époque où les pouvoirs de perquisition ont été conçus, la «chose» à saisir était incontestablement une chose matérielle et de la même façon, l'atteinte était perçue comme un acte matériel comme c'est encore le cas aujourd'hui. Ce point de vue se reflète dans les problèmes juridiques rattachés à l'exécution des perquisitions et des saisies: la nécessité ou non d'annoncer l'entrée dans les lieux, les normes s'appliquant à l'utilisation de la force, les règles ayant trait à la détention des biens saisis. Par sa nature même, l'atteinte à la vie privée qui s'incarne dans une perquisition et une saisie ne peut manquer d'être remarquée. C'est certainement toujours le cas pour les fouilles personnelles. Certes une perquisition peut avoir lieu en l'absence de l'occupant. L'expérience pratique tend toutefois à montrer que de tels incidents constituent l'exception[25]. Même dans

ces cas exceptionnels, l'atteinte peut probablement être constatée par des traces de la perquisition, par l'enlèvement des objets saisis ou par l'avis laissé à l'occupant.

33. Le caractère visible et matériel de l'exercice de ce pouvoir correspond au caractère visible et concret des droits protégés par les règles canadiennes de responsabilité délictuelle et criminelle. Ces droits sont le reflet d'une époque où l'on considérait que les plus grandes menaces à la sécurité des personnes étaient de nature physique. C'est en réponse aux menaces concrètes provenant de ce qu'ils appelaient «l'état de nature» que des théoriciens libéraux des dix-septième et dix-huitième siècles tels que Hobbes et Locke ont inventé le concept d'un État politique garant de droits subjectifs concrets comme le droit à la vie, à la liberté et à la propriété[26]. En un certain sens, les lois relatives aux perquisitions et aux saisies s'harmonisaient bien avec cette conception puisqu'elles créaient des exceptions pour certains types d'actions elles aussi concrètes.

34. La mise au point de techniques de collecte d'informations ne laissant aucune trace est venue réduire la netteté de cette corrélation entre l'atteinte et la protection. En 1967, Alan Westin écrivait ce qui suit:

> [TRADUCTION]
> Grâce à une percée technologique dans le domaine des moyens de surveillance physique, des agents de renseignements gouvernementaux et des personnes privées peuvent maintenant violer l'intimité des maisons, des bureaux et des véhicules, surveiller des personnes se déplaçant dans des endroits publics et contrôler les principaux réseaux de communications téléphoniques, télégraphiques, radiophoniques, télévisées ainsi que les réseaux de transmission de données[27].

Face à ces innovations, la réponse du droit a été complexe et diffuse. Il s'est tout d'abord penché sur la nécessité de créer de nouveaux concepts en matière de vie privée pour parer à la menace de ces techniques sur les droits individuels[28]. Allant plus loin, il s'est demandé comment ces moyens technologiques pouvaient s'harmoniser avec les concepts traditionnels de perquisition et de saisie.

35. Ainsi, dans l'arrêt *Berger*, la Cour suprême des États-Unis a décidé que l'utilisation d'appareils électroniques pour intercepter des conversations constituait une «perquisition» au sens du quatrième amendement à la Constitution américaine[29]. On peut juger louable l'intention de la Cour d'imposer des garanties constitutionnelles à l'égard de l'utilisation d'une technique que les auteurs de la Constitution américaine ne pouvaient prévoir. Toutefois, si la

technologie a facilité la surveillance, ce n'est pas elle qui en est à l'origine. L'intelligence humaine a conçu la surveillance bien avant l'apparition des transmetteurs électroniques. En fait, l'ancêtre de l'écoute électronique, l'écoute aux portes, avait été condamnée par Blackstone comme constituant un comportement répréhensible selon le common law[30]. La technique dans ce cas est évidemment différente de celle de la surveillance électronique, mais la progression des étapes reste cependant la même: l'observateur entre dans un lieu, et attend ensuite un événement qui lui fournira le renseignement recherché. En d'autres termes, alors que les perquisitions visent à obtenir un objet ou un renseignement déjà présent sur les lieux au moment de l'entrée, le but de la surveillance est d'obtenir des objets ou d'observer des faits postérieurement à celle-ci.

36. La surveillance diffère donc de la perquisition et de la saisie non pas par sa technique, mais bien par sa chronologie. Il est intéressant de constater que le *Code de l'A.L.I.*, tout en adoptant le point de vue que la surveillance constitue un genre de perquisition reconnaît cette distinction:

> [TRADUCTION]
> Dans le cas des perquisitions prenant la forme d'une surveillance, on ne cherche pas des objets ou des renseignements «en existence» au début de la perquisition. On veut plutôt observer le comportement et les propos d'une personne pendant une période continue, dans l'espoir que cette investigation permettra d'obtenir des preuves ou d'autres renseignements[31].

Certaines exigences de procédure découlent de cette distinction. Par exemple, l'efficacité de la surveillance, contrairement à celle de la perquisition, dépend du fait qu'elle demeure inconnue des personnes concernées pendant une longue période de temps[32].

37. Cette distinction, n'étant pas fondée sur un critère technologique, ouvre la porte à l'utilisation de matériel moderne pour les perquisitions et les saisies, par exemple, à l'utilisation d'un appareil photographique pour noter le contenu d'une habitation. L'utilisation de la technologie moderne permet évidemment d'effectuer des saisies et des perquisitions d'une manière plus discrète et même clandestine; ce progrès porte atteinte notamment à certaines protections basées sur le caractère visible de l'atteinte. L'importance de ces mécanismes de protection sera discutée au chapitre 7 du présent document de travail[33].

II. Les droits attaqués

38. Les pouvoirs de perquisition et de saisie entrent en conflit avec quatre types fondamentaux de droits de la personne: la sécurité de la personne, la jouissance de ses biens et les droits connexes, la protection du caractère privé de ses déclarations et de ses communications, et le droit à la non-divulgation de renseignements sur sa vie privée. Il convient donc pour cette raison d'étudier brièvement les protections légales dont font l'objet ces droits de la personne.

A. L'inviolabilité de la personne

39. L'inviolabilité de la personne humaine est reconnue comme un droit distinct par la *Charte canadienne des droits et libertés*[34] ainsi que par la *Déclaration canadienne des droits*[35]. L'inviolabilité de la personne a également été reconnue en droit civil québécois[36]. Le common law a lui aussi élaboré des règles de protection du corps humain. Le meilleur exemple se retrouve dans le domaine des délits et quasi-délits et en droit criminel dans la définition des causes d'action et des infractions portant sur l'intégrité corporelle: assaut, voies de fait et séquestration dans le premier cas, et diverses voies de fait occasionnant des blessures, et infractions sexuelles dans le deuxième cas. La diversité de ces protections légales et la gravité des conséquences qu'entraîne leur violation montrent qu'en droit canadien, la sécurité de la personne est actuellement encore mieux protégée que certains autres droits connexes tels que la liberté et la jouissance de ses biens.

40. Cette protection particulière est aussi manifeste dans la jurisprudence sur les pouvoirs de perquisition. L'arrêt *Ella Paint* constitue la décision canadienne qui fait autorité sur cette question. Un agent muni d'un mandat de perquisition y a été trouvé coupable de voies de fait commises en fouillant un occupant. Le juge Harris, de la Cour suprême de la Nouvelle-Écosse, écrit à ce sujet:

> [TRADUCTION]
> La loi autorise celui qui effectue une perquisition à forcer les portes, les serrures, les armoires, les placards, etc. Mais elle ne parle aucunement de la fouille des occupants. Si le législateur entend autoriser une

> procédure aussi inhabituelle, on peut s'attendre à ce qu'il le fasse de façon claire et précise. En effet, la fouille d'un occupant représente une atteinte plus grave à la vie privée d'une personne que le fait de forcer une porte ou une armoire[37].

Le common law, comme le montre ce passage, exige seulement que les fouilles de personnes soient autorisées de façon claire et précise. Lorsque l'autorisation est conférée par la loi, les tribunaux lui font droit.

41. En réalité, les fouilles de personnes sont autorisées par de nombreuses dispositions de la législation canadienne pertinente, bien que de façon non uniforme. Parmi toutes les dispositions légales relatives au mandat en droit criminel étudiées dans le présent document de travail, seulement quatre d'entre elles semblent conférer le pouvoir de fouiller des personnes: les articles 101[38] et 353 du *Code criminel*, l'article 10 de la *Loi sur les stupéfiants* et l'article 37 de la *Loi des aliments et drogues*. Si les fouilles de personnes constituent un pouvoir ainsi limité, cela ne tient pas véritablement à la grande importance attribuée par les législateurs anglo-canadiens à l'intégrité corporelle. L'explication réside plutôt dans le lien historique entre le mandat et les perquisitions dans les habitations. En fait, parallèlement à l'élaboration, au cours des trois derniers siècles, des garanties offertes par le mandat contre des entrées abusives dans des lieux privés, il y a eu multiplication de pouvoirs relativement discrétionnaires autorisant, sans mandat, les fouilles de personnes[39]. Parmi ces pouvoirs, les plus anciens (les fouilles de personnes lors d'une arrestation ou en vue de trouver des armes dangereuses) tirent leur origine du vieux droit britannique et font toujours partie du droit canadien[40]. Si l'on ajoute encore le pouvoir absolument discrétionnaire des policiers de demander à une personne de consentir à être fouillée, une conclusion s'impose: le droit canadien offre aux agents de la paix de nombreuses exceptions leur permettant de passer outre au principe de l'inviolabilité de la personne.

42. Mais jusqu'à quel point les agents de la paix peuvent-ils invoquer ces exceptions? Est-il possible de fouiller toute partie du corps en vue de trouver ce que recherche l'agent de la paix? Il est arrivé au moins une fois qu'un tribunal canadien réponde à cette question par la négative. Dans l'affaire *Laporte* v. *Laganière J.S.P.*, la Cour du banc de la Reine du Québec a invalidé un mandat de perquisition qui autorisait l'extraction de balles du corps d'un homme. Les commentaires du juge Hugessen portaient plus particulièrement sur l'interprétation de l'article 443 et sur le pouvoir de common law d'effectuer une fouille lors d'une arrestation. Ils

manifestaient fortement aussi la nécessité de définir une ligne de conduite:

> [TRADUCTION]
> Je ne suis pas le premier juge, et je crois bien que je ne serai pas le dernier, à dire que le risque de voir quelques coupables échapper aux filets de la justice ne représente pas un prix trop élevé à payer pour sauvegarder la liberté. Si le ministère public ne peut faire la preuve de l'accusation portée contre Laporte sans recourir à la violence physique sur sa personne, il est préférable que l'accusation ne soit pas prouvée[41].

Par contre, les tribunaux canadiens ont sanctionné certaines atteintes à l'intégrité corporelle, particulièrement dans le cas d'explorations du corps n'exigeant pas de chirurgie. De nombreuses décisions, notamment *Scott*[42] et *Brezack*[43], ont affirmé le droit pour les agents de la paix d'effectuer des fouilles de la bouche dans le but de trouver des stupéfiants ou des drogues. De plus, dans l'affaire *Reynen* v. *Antonenko*, il a été décidé qu'un examen rectal, effectué par un médecin mandaté par la police, ne constitue pas un acte illégal, si l'utilisation de la force est raisonnable, appropriée et nécessaire[44].

43. La question délicate des atteintes à l'intégrité corporelle pour l'obtention de preuves ne se pose pas uniquement dans le cadre du pouvoir traditionnel de perquisition et de saisie; elle entre aussi en ligne de compte dans la rédaction de dispositions légales sur la prise d'échantillons de sang, d'urine ou d'autres substances corporelles. Le droit de refuser de se prêter à de tels prélèvements, il faut le souligner, est reconnu dans le *Code criminel*[45]; mais en revanche, la police n'est soumise à aucune procédure à cet égard. Elle n'est pas tenue de faire de mise en garde et il n'existe pas de formules prescrites pour demander le consentement[46]. De telles pratiques pourraient être considérées comme des perquisitions et des saisies selon le sens que nous avons donné à ces expressions; nous croyons cependant que ces techniques doivent être étudiées séparément. Cette question sera par conséquent traitée dans un autre document de travail[47]. Le présent document de travail traite des pratiques suivantes dans le domaine des enquêtes: les fouilles buccales, les fouilles à nu, ainsi que les fouilles rectales et vaginales pour découvrir des objets.

44. Les fouilles internes suscitent des préoccupations au regard de deux impératifs: la sécurité de la personne et la dignité humaine. Le premier surgit, par exemple, dans le cas des fouilles buccales qui peuvent impliquer l'utilisation d'une technique de pression dangereuse sur la gorge. Un agent qui témoignait devant la *Royal Commission into Metropolitain Toronto Police Practices* a émis

l'opinion que [TRADUCTION] «dans le but de préserver un élément de preuve, il était permis d'étouffer un suspect même jusqu'au point de mettre sa vie en danger[48]». Dans l'affaire *Laporte*, la Cour a cependant refusé de reconnaître que les avantages découlant de l'obtention d'une preuve puissent vraiment justifier de mettre une vie en danger. L'article 25(3) du *Code criminel* confirme d'ailleurs ce point de vue, en imposant des limites strictes aux actes de la police qui sont «de nature à causer la mort ou des lésions corporelles graves».

45. Le deuxième impératif se fonde sur l'idée que la dignité humaine doit à l'occasion primer sur l'utilisation d'appareils scientifiques destinés à explorer le corps. Il a été souligné par Mayrand de la façon suivante:

> La justice doit refuser une collaboration de la science qui se ferait au mépris du caractère sacré de la personne. Comme le disait Rabelais, «Science sans conscience est la ruine de l'homme»[49].

Cette préoccupation s'applique aux perquisitions, fouilles et saisies surtout dans le cas de fouilles rectales ou vaginales. Les directives de la police disent clairement que de telles fouilles ne peuvent être effectuées que par un agent du même sexe que la personne soumise à la fouille. Elles exigent aussi que les agents demandent aux suspects d'exposer la région du rectum ou du vagin plutôt que de toucher eux-mêmes le suspect[50]. De tels gestes demeurent cependant de graves atteintes à la pudeur et à la dignité. Ces atteintes ne commencent pas seulement au moment de l'examen corporel, mais plutôt dès que la personne est contrainte à se dévêtir et à se soumettre à des touchers sexuels.

B. La protection du droit de propriété et des droits connexes

46. Lord Camden, dans l'affaire *Entick* v. *Carrington*, a exprimé le caractère sacré que la loi à cette époque reconnaissait au droit de propriété:

> [TRADUCTION]
> C'est dans le noble but de préserver leurs biens que les hommes ont formé la société. Ce droit conserve un caractère sacré et inaliénable dans tous les cas où il n'a pas été supprimé ou restreint par une loi quelconque au profit de tous[51].

Les deux siècles qui ont suivi la décision de Lord Camden ont vu une expansion considérable des exceptions à la primauté de la propriété privée. Le point de vue de Lord Camden représente maintenant un anachronisme, comme l'a récemment souligné le lord juge Salmon de la Cour d'appel de l'Angleterre, pour qui les propos de Lord Camden sont [TRADUCTION] «à la fois archaïques et incongrus[52]». Il est cependant possible d'isoler de son contexte désuet la préoccupation très légitime qui se trouve à la base du jugement (la protection de la propriété individuelle contre les atteintes arbitraires de la part de l'État)[53].

47. Historiquement, la notion de propriété a rempli de nombreux rôles, dont deux ont une pertinence particulière par rapport au pouvoir de perquisition et de saisie. Le premier est la protection des biens légitimes d'une personne contre leur appropriation par d'autres. Le deuxième, qui a trait au concept naissant de la vie privée, est l'attribution à l'individu d'un espace privé dans lequel il a le loisir d'être aussi seul qu'il le désire.

(1) *Les biens*

48. Le droit délimite le droit légitime de possession de l'individu sur les biens. Si d'autres tentent de se les approprier, celui qui est lésé peut demander réparation par divers moyens de droit. Au Québec, le droit de jouissance sur les biens de la part du propriétaire a été codifié[54]. En common law, des actions pour trouble de jouissance ou perte de bien mobilier donnent certains recours. Le droit pénal, pour sa part, prévoit diverses infractions comme le méfait, le vol et la fraude.

49. C'est à l'intérieur de cette zone protégée que la saisie, contrairement à la perquisition, produit d'une façon générale certains effets. Les conséquences de l'atteinte sont concrètes: le possesseur perdra probablement la jouissance et l'usage de la chose saisie pendant une longue période. Si l'on tient compte des possibilités d'appel et de deuxième procès, les inconvénients qu'entraîne la saisie de biens peuvent être considérables. Un exemple notoire récent nous est fourni par l'affaire *Pink Triangle Press*, au cours de laquelle des documents commerciaux d'un journal ont été détenus pendant plus de deux ans[55].

50. La subordination des droits de propriété aux exigences de l'application du droit pénal est allée de pair d'une manière implicite avec l'expansion des pouvoirs de perquisition au cours des siècles

derniers. Même si ces exigences sont légitimes, le possesseur individuel doit subir une certaine privation. À une certaine époque, on pensait que certains objets, par exemple les «documents personnels», ne pouvaient jamais faire l'objet d'une saisie[56]. De nos jours on reconnaît généralement que tout bien mobilier peut être saisi dès qu'il existe un rapport suffisant entre lui et une infraction qui a commencé à être perpétrée[57]. Toutefois, la protection des droits de la personne exige l'imposition de restrictions sur la manière dont l'État est autorisé à saisir et à détenir ces objets. Ces restrictions interviennent principalement après la saisie, la loi précisant le sort des biens saisis, et permettant un éventuel retour à leur possesseur. Ces règles s'appliquent aussi aux perquisitions. Ainsi en est-il de la restriction générale selon laquelle seuls les objets mentionnés au mandat peuvent être saisis[58].

51. Dans l'exécution d'une perquisition, les biens d'une personne peuvent aussi être endommagés. Les agents de police qui agissent en vertu des dispositions existantes de la *Loi sur les stupéfiants*, par exemple, peuvent forcer les portes, les contenants et «toute autre chose[59]». Ces dommages forment un coût que le public doit en fin de compte assumer, sous la forme des pertes subies ou de la compensation versée à celui qui en a subi un préjudice.

(2) *L'espace privé*

52. La deuxième fonction de la propriété qui nous intéresse est l'attribution à l'individu d'un certain espace privé. L'individu à l'intérieur de cet espace est le maître. Ceux qui y pénètrent à l'encontre de sa volonté peuvent être poursuivis à titre d'intrus à la fois en vertu du droit civil et dans certaines provinces en vertu de dispositions législatives particulières[60].

53. Ce concept d'espace privé est étroitement lié à un autre concept qui suscite beaucoup d'intérêt depuis peu: la protection de la vie privée. Jusqu'à récemment, la privation de la jouissance d'un droit de propriété constituait l'un des deux principaux fondements des recours pour atteinte à la vie privée[61]. Qu'est-ce donc alors que la «vie privée»? Des définitions contradictoires ont été proposées par divers auteurs. Les problèmes théoriques de définition sont aigus. La meilleure solution est peut-être de considérer que la vie privée constitue un [TRADUCTION] «principe présentant un caractère élevé de généralité», plutôt que de tenter de formuler une règle précise[62]. Le fondement de ce principe, ainsi que les objectifs qu'il défend, ont malgré tout été exprimés en termes très simples:

[TRADUCTION]
Depuis que l'homme est devenu un animal social, son droit à l'intimité a toujours constitué l'une des garanties essentielles de sa liberté. En ce sens, il peut être considéré comme libre, dans la mesure exacte où on le laisse en paix dans cette partie profonde de son être qui ne regarde que lui-même, pour penser et agir sans être soumis à des restrictions légales ou à la curiosité des autres....[63]

Dans un certain sens, la notion de propriété a concrétisé ce droit d'être «laissé en paix» en attribuant à chacun un espace privé dans lequel personne, y compris l'État, ne peut s'immiscer sans raison exceptionnelle.

54. Pour ce qui est des perquisitions et des saisies, cet espace appartient à deux grandes catégories: les lieux privés et les véhicules. Le droit a établi une distinction entre ces deux catégories; les véhicules, même s'ils offrent une certaine intimité et une certaine sécurité à leurs occupants, ne font pas l'objet de la même protection que les habitations. Comme l'a fait remarquer la Cour suprême des États-Unis, [TRADUCTION] «la façon dont les automobiles sont construites, l'usage qu'on en fait et la réglementation qui s'applique dans ce domaine font que souvent, on ne peut raisonnablement s'attendre à y jouir du même degré d'intimité que dans les autres lieux privés[64]». Cette distinction entre véhicules et habitations a une importance toute particulière pour déterminer dans quelles circonstances les perquisitions sans mandat peuvent être autorisées. Cette question sera donc abordée en détail au chapitre six[65].

55. Il est sans doute plus important de se demander s'il existe une distinction valable entre les maisons d'habitation et les autres lieux où l'individu peut s'attendre, en toute justice, à ce que son intimité soit respectée. L'idée que la maison d'un individu représente son ultime refuge, le lieu où il peut [TRADUCTION] «se retirer... et y être à l'abri d'immixtions injustifiées de la part du gouvernement[66]» a un puissant attrait sur le plan émotif. Elle est à la source du vieil adage: [TRADUCTION] «La maison de chacun est pour lui son château», exprimé pour la première fois par Lord Cole dans l'affaire *Semayne's Case*[67] et souvent reproduit depuis lors dans les jugements. Le fait d'être à l'abri d'atteintes à la vie privée dans sa demeure reste, selon l'expression d'un juriste américain, [TRADUCTION] «l'archétype de la protection en matière de vie privée[68]». Le champ de cette protection a toutefois été élargi pour englober aussi d'autres domaines. La déclaration de Lord Cole a été reprise dans certaines décisions relatives à des lieux non résidentiels, des bureaux par exemple[69]. Peut-on dès lors assimiler certains lieux privés aux

lieux d'habitation et les faire bénéficier de la protection reconnue déjà à l'égard de ces derniers[70]?

56. Certaines dispositions subsistent dans la législation, sur le plan de la procédure. Les règles régissant les perquisitions relatives à des armes à feu en vertu de l'article 99 du *Code criminel* et celles qui ont trait aux stupéfiants et aux drogues en vertu des dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* interdisent l'entrée dans des maisons d'habitation sans autorisation écrite alors que cette autorisation n'est pas exigée dans le cas de locaux non résidentiels[71]. Ces distinctions se retrouvent aussi en common law, la permission d'entrer n'étant requise que pour une perquisition dans une maison d'habitation[72]. L'existence de règles distinctes à l'égard des lieux d'habitation et des autres lieux demande toutefois selon nous une évaluation critique. Les perquisitions dans des bureaux, par exemple, sont tout aussi susceptibles de porter atteinte au droit à la vie privée, que les perquisitions dans des lieux d'habitation. Même si le fait qu'il s'agisse de lieux privés résidentiels ou non résidentiels conserve parfois son importance, par exemple lorsqu'il s'agit de déterminer si l'on doit autoriser une perquisition de nuit, cette distinction ne semble plus constituer une ligne de démarcation permettant de protéger adéquatement le droit des individus à la vie privée contre les atteintes arbitraires.

57. La prolifération des pouvoirs de fouille et de perquisition a entraîné la subordination de l'inviolabilité des espaces privés, tout comme celle des biens personnels, aux objectifs d'application du droit pénal. Il est généralement reconnu que le droit de l'individu à l'intimité et à la solitude doit céder devant la nécessité légitime pour la police d'obtenir les objets recherchés par les perquisitions et les saisies. Cette suspension de la maîtrise de l'individu sur son domaine demeure une atteinte sérieuse. Elle constitue cependant une privation plus abstraite que le préjudice subi par l'individu à qui l'on enlève ses biens. Dans le premier cas, en effet, la personne ne perd rien de concret, sinon la faculté de décider qui peut se trouver dans son espace privé. De plus, contrairement au second cas, l'atteinte à l'espace privé lors d'une perquisition est relativement brève et non prolongée[73]. Pourtant, l'importance de l'espace privé semble avoir inspiré davantage de commentaires de la part des juges que tout autre problème relié aux perquisitions et aux saisies. Cette attitude est bien fondée dans la mesure où cet espace offre à l'individu une protection de la plus haute importance pour la préservation de sa vie privée. Elle révèle cependant une certaine étroitesse d'esprit, dans la mesure où notre droit a eu tendance à favoriser la protection de cet espace au

détriment d'autres droits comme le droit de jouissance des biens. Il ne suffit pas vraiment de limiter l'accès à cet espace si on laisse celui qui a réussi à y pénétrer libre d'y saisir ce qu'il veut.

C. La protection des déclarations et des communications

58. Le caractère privé des déclarations et des communications d'une personne est davantage menacé par les pouvoirs de surveillance que par les pouvoirs de perquisition et de saisie. Les déclarations et les communications sont en effet des phénomènes dynamiques, qui se développent et s'étendent sur une certaine période de temps. Il faut donc une atteinte continue pour obtenir les renseignements désirés. Les pouvoirs de perquisition et de saisie n'entrent en jeu que si les déclarations ou les communications sont enregistrées ou résumées de manière à être préservées sous une forme concrète.

59. De façon générale, les règles régissant les biens s'appliquent aussi aux enregistrements de déclarations et de communications. Les reproductions de ceux-ci sont régies par le droit d'auteur. Leurs supports matériels, papiers, livres, rubans magnétoscopiques et films, comme tant autres biens peuvent donner lieu à des recours délictuels et quasi délictuels, ou à des accusations de vol et de fraude en droit pénal:

> [TRADUCTION]
> Si le fonctionnaire *A* ouvre le courrier de *B* et le lit, *B* pourra sans doute intenter avec succès une poursuite en dommages et intérêts.... Cependant, si *A* ne fait que lire une lettre déjà ouverte sans y toucher, *B* n'a aucun recours parce qu'il n'y a pas eu d'intervention directe. Le fait que la plainte de *B* soit fondamentalement la même dans les deux cas n'a aucune importance. Dans la première situation, *A* doit répondre non pas de son atteinte à la vie privée de *B*, mais plutôt de son immixtion dans les biens de *B*. Ce type d'analyse s'appliquerait de la même façon à des objets tels que des agendas ou des dossiers financiers personnels[74].

60. Ce type de documents ne jouit pas non plus d'une protection particulière contre les perquisitions et les saisies. Dans la mesure où ils peuvent fournir des renseignements pertinents, ils peuvent être saisis avec d'autres éléments de preuve d'une infraction[75]. Il s'agit là d'une dérogation à la tradition de common law, qui considérait les «documents privés» comme sacro-saints. Cette tradition reconnaissait le droit de l'individu de décider

lui-même du moment où il allait [TRADUCTION] «partager ses secrets avec d'autres», et des circonstances dans lesquelles il allait le faire. Le fait qu'un document puisse révéler un secret sur une personne ne constitue plus un motif valable pour l'exempter d'une saisie. Au contraire, si le secret a un lien probant avec une infraction, il peut souvent précisément fournir la justification de l'atteinte.

61. On relève cependant un cas exceptionnel de protection spéciale des communications contre les saisies: il s'agit du droit au secret, portant sur les objets en possession d'un avocat et éventuellement de membres de la presse. Cette question sera abordée dans la deuxième partie du présent document de travail[76].

D. L'obtention de renseignements

62. Tous les droits de la personne mentionnés jusqu'ici portent également sur les renseignements. La fouille corporelle ou la perquisition dans une habitation, l'examen des biens ou des communications d'une personne entraînent la divulgation de certains faits qui la concernent. Les renseignements sur une personne peuvent être révélés d'autres façons, sans que les droits qui lui sont traditionnellement reconnus ne soient attaqués. Un individu peut être observé de l'extérieur de sa maison ou de son lieu de travail. Certaines de ses connaissances, des institutions privées et des organismes gouvernementaux possèdent déjà des renseignements sur lui. Il est possible dès lors de demander à l'un de ces groupes de coopérer à une enquête. Il peut être également soumis pour l'obtention de ces renseignements à certaines actions coercitives de la part de la police. Enfin d'un autre côté, l'enquête de la police représente une source éventuelle d'information, à la fois pour la personne elle-même et pour les groupes de pression extérieurs, telle la presse.

63. Le phénomène de la collecte d'information eu égard à la technologie moderne et au développement des méthodes de surveillance a déjà été examiné[77]. Les progrès réalisés dans l'obtention et la classification des renseignements ne remettent pas seulement en question le caractère physique traditionnel de la protection de la personne. Ils soulèvent aussi le spectre d'une société où l'individualité serait anéantie parce que les citoyens n'auraient aucune vie privée et qu'ils deviendraient alors vulnérables à toute forme de manipulation. La menace d'une société de ce type, qui

rappelle le *1984* de George Orwell a suscité de graves et déchirantes discussions quant aux moyens législatifs propres à la prévenir[78].

64. Aucun droit général ne permet d'empêcher d'autres personnes d'obtenir des renseignements sur soi, même si ces renseignements ont trait à un droit qui est lui-même protégé. Une personne peut, par exemple, s'approprier et utiliser des renseignements sur une autre personne qui tombent dans la sphère d'intimité de cette dernière, pourvu qu'il n'y ait pas de violation physique de la sphère elle-même[79]. Cependant, une personne peut se protéger contre l'obtention de tels renseignements de deux façons particulières. Tous les rapports entre cette personne et le tiers peuvent être marqués d'un élément de confidence essentiel. L'obligation de confidentialité peut découler d'un contrat[80], ou de circonstances qui, pour une personne raisonnable, en commandent le respect[81]. Ensuite, comme pour les institutions gouvernementales, une obligation légale de non-divulgation peut être imposée à celui qui possède des renseignements sur le citoyen[82].

65. Quel est l'impact de ces restrictions sur l'obtention de renseignements par la police? Sauf le cas des renseignements confidentiels prévus par le secret professionnel, l'obligation de non-divulgation ne l'emporte pas sur l'intérêt légitime de les obtenir aux fins de l'application de la loi. Si un renseignement se trouvant dans l'agenda d'une personne peut être saisi dans sa propre demeure, il ne serait pas logique qu'il ne puisse être obtenu à un autre endroit. La *Loi sur la protection des renseignements personnels* fédérale, par exemple, reconnaît que l'obligation des institutions fédérales de refuser de communiquer des renseignements personnels disparaît lorsque leur obtention est autorisée par mandat ou qu'elle est exigée par un organisme d'enquête[83].

66. Si l'obtention de renseignements constitue une atteinte aux droits, il est normal d'admettre qu'elle doit aussi être soumise à des garanties de procédure, indépendamment du fait que la perquisition peut entraîner un empiétement sur des espaces privés et sur le droit de propriété. Cette attitude fut adoptée, par exemple, par la Commission Krever en Ontario. Celle-ci a recommandé qu'aucun employé de la caisse provinciale d'assurance-maladie n'ait le droit de divulguer à la police des renseignements sur la santé d'une personne sans mandat de perquisition[84]. Dans le secteur privé, certaines institutions comme les banques et les sociétés de téléphone exigent maintenant de façon courante une autorisation légale avant de divulguer à la police des renseignements sur leurs clients. Il est sain

selon nous de reconnaître ainsi le caractère privé des renseignements personnels. Nous tenterons donc, dans le présent document de travail, de tenir compte de cette préoccupation[85].

III. Les modalités d'autorisation des perquisitions et saisies

A. Le mandat

(1) *Le mandat en tant que pouvoir*

67. «Dans son premier sens, le mandat est un pouvoir», selon la définition de Sweet[86]. Plus précisément, selon la tradition de common law, le mandat est un document, délivré par un fonctionnaire désigné, qui confère un pouvoir à celui à qui il est destiné. Ce pouvoir, dans le contexte des pouvoirs de perquisition et de saisie, permet de se livrer à des atteintes à la vie privée dans la poursuite des buts précédemment décrits: obtenir ou détenir des objets ou des renseignements qui existent déjà.

68. Le mandat bien sûr n'est pas la seule façon d'autoriser ces atteintes; les pouvoirs de perquisition et de saisie peuvent être directement accordés par la loi à une catégorie précise de personnes, avec la restriction éventuelle qu'elles ne peuvent les exercer à moins d'être certaines de l'existence de certaines circonstances[87]. La procédure du mandat par rapport à ces derniers cas comprend une étape supplémentaire. Elle remet les décisions relatives à la perquisition et à la saisie entre les mains d'une personne qui n'est pas celle qui exécute le pouvoir. On peut voir aujourd'hui dans cette procédure en deux étapes un mécanisme de contrôle. Toutefois, à l'origine cette procédure n'a pas été créée pour permettre de disposer d'un moyen de contrôle. Elle visait au contraire plutôt à étendre le pouvoir en question.

69. Pour bien comprendre le mandat pris dans son sens de «pouvoir», il faut tenir compte de son évolution historique. Fondamentalement, l'apparition du mandat en Angleterre est liée à l'influence d'un personnage dont l'importance fut énorme: le juge de

paix. Au cours du seizième siècle, celui-ci devint «l'abatteur de besogne de l'administration locale», chargé d'une série de fonctions touchant aussi bien l'administration que l'application de la loi[88]. L'exercice de ses fonctions exigea éventuellement l'affirmation de son autorité face à l'organisation policière de son époque, la force de police locale. Cette affirmation d'autorité se manifesta par l'adoption du mandat[89].

70. Le mandat représentait en fait une extension de l'autorité du juge, extension rendue nécessaire par le fait qu'il était impossible pour ce dernier de remplir personnellement tous les nouveaux devoirs qui lui incombaient:

> [TRADUCTION]
> Au Moyen Âge, il était difficile et dangereux de circuler en Angleterre, même à l'intérieur des territoires des juges de paix, qui étaient relativement peu étendus. Grâce au mandat, les juges de paix, soucieux de limiter leur déplacements, pouvaient donc donner des instructions aux constables. Il constituait accessoirement un signe d'autorité en plus du bâton symbolique[90].

À l'origine, donc, le mandat était un mécanisme qui permettait simultanément au juge de paix de déléguer des responsabilités, tout en conservant un droit de regard sur la façon dont elles étaient exercées. Il permettait en outre de définir les pouvoirs du délégataire. L'utilisation du mandat se fit plus fréquente à mesure que les responsabilités du juge de paix augmentaient.

71. La nécessité d'apporter une réponse aux plaintes concernant les biens volés a été à la source du développement du mandat de perquisition. Dans son *History of the Pleas of the Crown*, Hale a décrit la procédure à suivre dans de tels cas. Cette description allait, par la suite, avoir une grande influence:

> [TRADUCTION]
> Dans les cas où il y a plainte sous serment concernant des biens volés, le juge de paix, s'il soupçonne que les biens se trouvent dans une maison et qu'il montre sur quoi est fondé son soupçon peut délivrer un mandat autorisant une perquisition dans les endroits suspects y mentionnés ainsi que la saisie des biens et de la personne qui en a la garde, et exigeant que cette dernière soit amenée devant lui ou devant un autre juge de paix pour expliquer comment elle en est entrée en possession....[91]

Il vaut la peine de noter les personnages dans le modèle de Hale: celui qui faisait la demande était un simple citoyen ayant recours au juge de paix pour obtenir les services de l'appareil local d'application de la loi en vue de faire valoir ses réclamations. Le constable était l'agent

envoyé par le juge de paix. Ces rôles ont profondément changé au cours des siècles qui ont suivi les observations de Hale. C'est en effet la police elle-même qui en est venue à demander *proprio motu* un mandat dans presque tous les cas, même si elle peut aussi agir à la suite de plaintes privées[92]. De même, le contrôle administratif des activités policières est passé du juge de paix à de nouvelles structures administratives: les administrateurs des forces policières qui relèvent des ministres du Cabinet, des conseils municipaux et des organismes administratifs locaux[93]. Ces changements tirent leur origine de la naissance d'une véritable force policière moderne au milieu du dix-huitième siècle, phénomène que ne pouvait pas prévoir Hale. Comment se fait-il alors que la procédure envisagée par lui demeure fondamentalement la même et que le mandat représente toujours un pouvoir donné par un juge de paix à celui qui en est investi d'effectuer la perquisition et la saisie demandées?

72. Essentiellement, la nature du pouvoir conféré par le mandat a changé en même temps que les institutions sociales reliées à ces procédures. Lorsque le juge de paix accorde un mandat à un agent de police, cet acte ne représente plus tant une délégation de pouvoirs de la part d'un administrateur, qu'une décision d'autorité rendue par un arbitre. C'est en fait la démarcation entre la fonction décisionnelle du juge et les devoirs exécutifs de l'agent qui caractérise le mandat selon la jurisprudence moderne. Un arrêt ontarien de 1965, *Re Worrall* a décidé en ce sens:

> [TRADUCTION]
> L'agent de police n'est pas un officier de justice. Il n'a pas à décider si les objets en question devaient ou non être saisis. Il appartenait au juge de paix, selon la preuve qui était devant lui, de trancher cette question[94].

La notion de contrôle est intrinsèquement liée à cette séparation des pouvoirs. L'agent de la paix ne peut effectuer une perquisition ou une saisie avant que le juge, ayant apprécié sa demande, ne lui permette de le faire.

73. Même si la jurisprudence récente a mis l'accent sur cette notion de contrôle, il est important de souligner que son fondement se trouve dans le modèle de Hale. Hale a élaboré sa notion de mandat au moment où le common law commençait à prendre de l'autorité. Il dut faire face à l'hostilité de ceux qui, tel Coke, voyaient dans le mandat une atteinte au droit de propriété et la fin de la souveraineté du Parlement[95]. Hale était cependant lui aussi un bon juriste de common law. Tout disposé qu'il était à sanctionner le mandat de perquisition comme mécanisme nécessaire à l'arrestation des criminels, il prit soin

de le revêtir de caractéristiques propres à calmer quelques-unes des plus grandes craintes face à une atteinte incontrôlée de l'État. Ces caractéristiques, que la jurisprudence a constamment fait ressortir depuis lors, sont essentiellement doubles: le caractère judiciaire du mandat et sa spécificité.

(2) *Le caractère judiciaire du mandat*

74. Selon Hale, les mandats de perquisition visant des biens volés étaient des [TRADUCTION]«actes judiciaires» qui devaient être «délivrés après examen des faits[96]». Cette caractéristique a été reprise par de nombreux tribunaux de common law au cours des trois siècles qui ont suivi la parution du traité de Hale. D'une façon constante, les tribunaux canadiens ont annulé des mandats de perquisition lorsque les circonstances indiquaient que le juge qui avait délivré le mandat n'avait pas agi de façon judiciaire. Le jugement définitif sur le caractère judiciaire de la délivrance des procédures a sans doute été rendu récemment par le juge Dickson, pour la majorité de la Cour suprême, dans l'arrêt *MacIntyre*: «La délivrance d'un mandat de perquisition est un acte judiciaire fait par le juge de paix, habituellement *ex parte* et à huis clos, à cause de la nature même des procédures[97]».

75. Cette description correspond-elle vraiment à la réalité lorsqu'on demande au juge de paix dans son bureau d'émettre un mandat? La question est fort importante. Certains indices tendant à prouver la négative seront discutés ailleurs dans le présent document de travail[98]. Pour l'instant, il importe de souligner, d'un point de vue historique, que cette fonction «judiciaire» précise était en fait accordée à une personne dont l'ensemble des fonctions ne faisait certainement pas d'elle l'arbitre neutre et indépendant que la jurisprudence moderne associe à une fonction judiciaire:

> [TRADUCTION]
> Le juge de paix pouvait délivrer le mandat d'arrestation, perquisitionner, effectuer la capture, interroger l'accusé et en l'absence de témoins lui soutirer une confession en lui parlant comme un ami ou en l'intimidant comme un magistrat, l'incarcérer et finalement rendre un témoignage accablant lors du procès[99].

Le juge de paix, même s'il a perdu beaucoup de ses pouvoirs en matière d'application de la loi avec l'émergence de la force policière moderne, conserve cependant certains vestiges de ses fonctions exécutives dans la législation moderne. En vertu de l'article 2 du

Code Criminel, par exemple, le juge de paix est toujours compris dans la définition d'«agent de la paix».

76. Comment se fait-il alors que la jurisprudence, depuis l'époque de Hale, ait affirmé de façon constante le «caractère judiciaire» de la procédure du mandat de perquisition? La jurisprudence semble avoir principalement distingué la *fonction* de la *charge*, en considérant que la première est différente de la seconde. En d'autres termes, l'exigence d'un caractère judiciaire serait reliée non à la fonction du juge de paix mais plutôt à l'effet même du mandat. Comme la chose a été dite récemment dans l'affaire *Re Pacific Press Ltd.*,

> [TRADUCTION]
> [l]e mandat de perquisition constitue un outil qui, dans l'administration du droit criminel, permet aux officiers de justice d'effectuer une perquisition dans la demeure d'une personne ou dans un autre bâtiment pour découvrir, parmi d'autres choses, une preuve susceptible d'être utilisée lors de la poursuite d'une infraction criminelle. Depuis des temps immémoriaux, les tribunaux de common law se sont évertués à protéger les citoyens contre l'utilisation injustifiée de ce pouvoir extraordinaire[100].

77. C'est donc à cause de son aversion pour les atteintes aux droits individuels que le common law a élaboré le concept du mandat comme mécanisme de contrôle, ou plus exactement de contrôle judiciaire. La jurisprudence a fait du mandat le signe d'une détermination objective et impartiale de l'existence d'une justification de l'atteinte. En outre, tout comme les décisions sur les questions de fait lors des procès et des procédures judiciaires semblables, la décision de délivrer un mandat doit être prise après la présentation d'une dénonciation sous serment. Le présent document de travail reconnaît que le mandat doit découler d'une décision judiciaire. Cette proposition servira à la fois de critère de mesure et d'objectif lors de l'examen des procédures légales appropriées.

(3) *La spécificité du mandat*

78. L'obligation de délivrer le mandat judiciairement est complétée par l'exigence d'une description précise de l'atteinte autorisée. Peu importe que celui qui délivre le mandat ait été très prudent en statuant sur la demande d'autorisation de perquisition et de saisie, si l'autorisation donne à celui qui utilisera ces pouvoirs une grande latitude quant au moment et à la façon de réaliser l'atteinte. De fait, les tribunaux canadiens ont refusé de reconnaître que les

dispositions relatives au mandat de main-forte donnent un pouvoir discrétionnaire, au motif que les vastes pouvoirs d'exécution dont dispose le détenteur du mandat rendent sans importance tout exercice de pouvoir discrétionnaire lors de sa délivrance[101]. D'un autre côté cependant, le fait de préciser le lieu de la perquisition, les objets qui doivent être saisis et l'infraction reprochée confère un rôle important à celui qui délivre le mandat. Au fond, la qualification «judiciaire» donnée par celui qui délivre le mandat, établit un lien entre ces éléments. Comme le faisait remarquer le juge Lerner dans l'affaire *PSI Mind Development*, la question est de savoir [TRADUCTION] «s'il y a suffisamment de détails ... pour que le juge de paix soit raisonnablement convaincu que les objets décrits et qui constitueraient une preuve de l'infraction se trouvent dans les lieux mentionnés[102]».

79. Le souci de précision propre au common law et le souhait du pouvoir exécutif de disposer d'un pouvoir discrétionnaire ont coexisté dans un climat de tension constante tout au long de l'histoire. Le recours à la procédure du mandat traduit en fait l'importance donnée au souci de certitude et exprime une préférence pour les atteintes bien définies conformes à la jurisprudence de common law. [TRADUCTION] «Le mandat de perquisition ne doit pas être général et viser tous les endroits suspects», déclarait Hale, «il ne doit autoriser la perquisition que dans des endroits précis à propos desquels la partie déclare devant le juge de paix avoir un soupçon et en donne le motif probable[103]». Ce principe de spécificité a été consacré dans presque toute la législation relative au mandat de perquisition, tant à l'égard du mandat lui-même que de la demande qui en est faite. De nos jours, il se manifeste par des exigences relatives non seulement au lieu de la perquisition, mais également à la description des choses à saisir et à l'infraction faisant l'objet de l'enquête. Comme le «caractère judiciaire», le critère de spécificité est considéré dans la présente étude comme un objectif premier.

B. Les pouvoirs exercés sans mandat

80. L'exercice du pouvoir de perquisition et de saisie sans mandat n'est subordonné qu'à deux conditions: l'auteur éventuel de l'atteinte doit avoir la qualité d'agent de la paix et il doit s'assurer de l'existence de certaines conditions préalables à l'exercice du pouvoir. Avec ce mode d'autorisation, pourrait-on dire, les avantages du

mandat sont sacrifiés en faveur de la grande latitude conférée à l'agent de la paix. Mais ce serait une erreur de croire que ces pouvoirs sont le résultat d'une étude comparative des avantages et des désavantages du mandat ou d'autres documents du même ordre. Le pouvoir de perquisition et de saisie sans mandat semble plutôt s'être établi en common law et dans les textes législatifs, du moins à l'origine, de façon tout à fait indépendante du pouvoir de perquisition et de saisie avec mandat.

81. La croissance des pouvoirs de perquisition et de saisie sans mandat s'explique par diverses raisons. Dans certains cas, l'absence des protections offertes par le mandat traduisait des distinctions sur le plan des valeurs. Un exemple: traditionnellement, les pouvoirs exercés en vertu d'un mandat étaient associés aux atteintes au droit de propriété privée, et tout particulièrement aux lieux d'habitation[104]. En revanche, les pouvoirs de perquisition, de fouille et de saisie sans mandat visaient à l'origine les atteintes à l'intégrité corporelle; et en particulier lorsqu'il s'agissait de l'intégrité corporelle d'une personne soupçonnée d'un crime, cette dernière ne jouissait que de très peu de protection contre la fouille[105]. Dans le cas de certains pouvoirs, l'absence de mandat peut s'expliquer par l'existence d'un danger inhérent à la présence d'armes à feu et à la distribution et la possession de stupéfiants et de drogues. Dans le cas des fouilles «de consentement», le principe qui justifie l'absence de mandat est le suivant: comme il ne peut y avoir d'atteinte, car l'individu visé consent à la perquisition ou à la saisie, les actes de l'agent de la paix n'ont pas à être autorisés par un document[106].

82. Que signifie l'absence de la protection offerte par le mandat dans de tels cas? Théoriquement, le fait de soustraire le mandat au processus d'autorisation n'implique pas nécessairement l'affaiblissement des critères qui offrent une protection contre les atteintes injustifiées. Il est possible d'énoncer, dans la disposition légale où sont autorisées les perquisitions et saisies sans mandat, les «motifs raisonnables» qui justifient l'atteinte et de décrire le champ de cette dernière dans des termes pratiquement identiques à ceux que l'on retrouve dans les dispositions relatives aux mandats. Le paragraphe 101(2) du *Code criminel*, par exemple, énonce une série de critères précis applicables aux perquisitions sans mandat visant à la découverte d'armes à feu; ces critères sont identiques à ceux qu'énonce le paragraphe 101(1) au sujet des perquisitions en vertu d'un mandat, sauf que la perquisition n'a pas à être autorisée par un mandat lorsque l'utilisation de cette procédure serait à toutes fins utiles impossible.

83. Mais en réalité, il est reconnu depuis longtemps que la pratique des perquisitions sans mandat implique la diminution du contrôle judiciaire sur l'exercice du pouvoir de perquisition. Le juge Jackson, de la Cour suprême des États-Unis, a bien fait ressortir ce fait dans ses commentaires sur le quatrième amendement de la Constitution américaine:

> [TRADUCTION]
> Le quatrième amendement n'a pas pour but, et souvent les agents zélés ne comprennent pas bien, d'empêcher le recours, dans l'application de la loi, aux conclusions normales que des hommes raisonnables peuvent tirer de preuves. La protection offerte consiste dans l'exigence que ces conclusions soient tirées par un magistrat neutre et sans préjugés au lieu d'être laissées au jugement d'un agent dont le temps est consacré à la lutte contre le crime, travail où la rivalité joue souvent un rôle. Dans l'hypothèse où l'existence de preuves suffisantes pour permettre à un magistrat de décider de façon impartiale de délivrer un mandat de perquisition pourrait justifier les agents de la paix à pratiquer une perquisition sans mandat, cet amendement perdrait toute signification si le respect de l'intimité des foyers relevait du seul pouvoir discrétionnaire des agents de police[107].

L'autorisation sans mandat permet aux perquisiteurs éventuels de juger si la perquisition est justifiée et quelle doit en être la portée; la décision risque par le fait même d'être empreinte de parti pris. Pour cette raison, nous appuyons plus loin dans le présent document de travail l'exigence d'un mandat à moins qu'il n'existe certaines circonstances justifiant une exception[108].

C. Le mandat de main-forte

84. Les mandats de main-forte sont parfois décrits comme des mandats de perquisitions «généraux» ou «en blanc»[109]; mais en réalité il ne s'agit pas du tout de cela. Essentiellement, ce sont des documents établissant que leurs détenteurs sont membres d'une catégorie particulière d'agents de la paix dotés de pouvoirs spéciaux de perquisition et saisie sans mandat. Pour bien comprendre la nature du mandat de main-forte, il est nécessaire de remonter à ses origines, qui sont étrangères au droit pénal.

85. Au début, le mandat de main forte était un recours en "equity" permettant à des citoyens de récupérer des biens-fonds ou des biens meubles[110]. Il est devenu un instrument d'application du

droit public avec la loi anglaise sur les douanes de 1662, dans laquelle il était conçu comme un moyen de régulariser et de maintenir la vieille pratique des perquisitions effectuées par les fonctionnaires des douanes de la Couronne pour découvrir des biens illégalement importés[111]. Le mandat décrit dans la législation sur les douanes permettait à ces fonctionnaires de s'identifier et d'obtenir une assistance dans la poursuite de leur perquisition. C'est ce dernier rôle du mandat qui explique son nom: lorsqu'il fut instauré, il s'agissait véritablement d'un mandat de «main-forte»[112].

86. Il y a toujours eu une différence importante entre le rôle et les caractéristiques du mandat de main-forte et ceux du mandat de perquisition traditionnel. À l'origine, le mandat de main-forte était essentiellement un document au nom du souverain, confirmant que le détenteur était une personne ayant compétence légale pour exercer un pouvoir d'entrée, de perquisition et de saisie et pour obtenir l'assistance de constables et d'autres personnes susceptibles de lui faciliter l'exécution de ses fonctions. Il s'agissait donc au départ d'un document administratif ou exécutif qui «autorisait» c'est-à-dire, dans un sens archaïque du terme anglais "authorized", qui attestait que le détenteur était un représentant de la Couronne[113]. Le mandat n'était donc pas destiné à conférer à son détenteur des pouvoirs de perquisition, mais bien à faciliter l'exercice des pouvoirs discrétionnaires qui lui était confiés en vertu de sa qualité d'agent des douanes.

87. Le sceau de la Cour de l'Échiquier était apposé sur le mandat, mais la procédure de délivrance n'avait rien de judiciaire pour autant. Au tout début, la délivrance du mandat de main-forte relevait entièrement du greffier: le juge n'y jouait aucun rôle. Le choix de la Cour de l'Échiquier pour la délivrance des mandats de main-forte peut étonner aujourd'hui. Mais à cette époque, cette cour, qui avait compétence en matière de perception des revenus et qui disposait de nombreux copistes, était sans doute l'organisme le mieux approprié pour remplir cette tâche[114].

88. Le mandat de main-forte se distingue également du mandat de perquisition par les pouvoirs qu'il confère aux détenteurs. Aux termes de la loi douanière typique, le détenteur avait un pouvoir discrétionnaire absolu pour pratiquer des perquisitions visant à la découverte de contrebande. Il n'était pas légalement tenu, ni au préalable, ni après le fait, de justifier par des motifs raisonnables ou probables son entrée dans des lieux privés; rien non plus ne venait restreindre sa fouille à des lieux précis ou ne l'obligeait à ne saisir que des choses figurant sur une liste dressée avant la perquisition.

L'existence d'un simple soupçon pouvait justifier en droit une perquisition exhaustive[115].

89. Ce pouvoir discrétionnaire a suscité d'âpres conflits dans les pays de common law. En Angleterre, par exemple, des conflits ont surgi au dix-huitième siècle relativement à certains mandats par trop généraux qui furent utilisés en vue de baillonner la presse. Dans l'ensemble, les tribunaux anglais réagirent en qualifiant ces mandats «d'oppressifs», «d'abominables» et de «pires que l'Inquisition espagnole»[116] et en les annulant lorsqu'ils n'étaient fondés sur aucune autorité légale expresse. C'est cependant dans l'Amérique d'avant la révolution que s'est produit le grand conflit historique à propos des mandats appelés «généraux». Son point culminant a été l'affaire *Paxton*: la Cour supérieure du Massachusetts, ignorant l'exemple de certaines cours d'autres États, accepta de délivrer les impopulaires «mandats de main-forte», suscitant ainsi une série de protestations qui devaient atteindre leur paroxysme au cours de la lutte menant à la révolution américaine[117].

90. Face à ce conflit, le Canada a adopté une attitude quelque peu ambivalente. Tout en maintenant le critère de spécificité dans le cas des mandats établis en vertu de dispositions légales suivant la tradition instituée par Hale, nos législateurs ont pris l'habitude de recourir au mandat de main-forte pour l'application des lois en matière de douanes et d'accise ainsi que de stupéfiants et de drogues[118]. Les juges canadiens ont ainsi, d'une part, annulé des mandats de perquisition ne comportant qu'une description «vague et générale» de la fouille autorisée[119], et se sont vus d'autre part obligés d'accéder, avec réticence, à des demandes visant des mandats beaucoup plus larges. Cette dualité de critères a des conséquences bien précises: étant donné la coexistence du mandat de main-forte et du mandat de perquisition en matière de stupéfiants et drogues, la protection normalement offerte par les exigences du mandat de perquisition se trouve fortement diminuée.

91. Le mandat de main-forte a subi de nombreuses modifications lorsqu'il fut repris au Canada dans la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*. Mais sur le plan juridique, il n'a pas changé de caractère, même si ces modifications ont dans une certaine mesure estompé sa signification originelle. Un exemple: le mandat de main-forte moderne est adressé au détenteur lui-même, tandis que le mandat de 1662 était adressé aux personnes qu'irait trouver l'agent des douanes pour leur ordonner de prêter aide et assistance au détenteur. Dans la mesure où la formulation moderne peut laisser croire que c'est le mandat lui-même qui autorise le détenteur à

pratiquer la perquisition et la saisie, elle fausse le sens premier du document. Mais en pratique, la possession du mandat a acquis une certaine pertinence pour la détermination, de façon plus générale, des pouvoirs de perquisition et de saisie de son détenteur. Cela est manifeste si l'on étudie deux modifications apportées au mandat originel. Tout d'abord, contrairement aux anciens mandats de main-forte douaniers (contrairement aussi, d'ailleurs, aux mandats définis dans l'actuelle *Loi sur l'accise*[120]), les mandats de main-forte en matière de stupéfiants et drogues ne peuvent pas faire l'objet d'une délégation entre agents de la paix. Ils ne confèrent des pouvoirs qu'à «la personne y nommée», toujours un agent de la Gendarmerie royale du Canada. Par ailleurs, l'agent de la paix détenteur d'un mandat de main-forte dispose d'un pouvoir de perquisition et de saisie dont est privé son collègue qui ne dispose pas d'un tel document: il s'agit du pouvoir discrétionnaire d'entrer dans une maison privée sans mandat de perquisition pour y chercher des stupéfiants ou des drogues.

92. Il existe une autre modification, superficielle celle-là: les mandats délivrés en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* le sont de nos jours par des juges de la Cour fédérale du Canada. Mais le rôle de la personne qui délivre le mandat consiste encore, pour l'essentiel, à signer un document, et à officialiser ainsi une décision administrative. Comme le disait sans ambages le juge Jackett dans l'affaire *Writs of Assistance*:

> [TRADUCTION]
> Si mon interprétation de la loi est juste, lorsque le détenteur d'un mandat de main-forte exerce les pouvoirs conférés par ce dernier, il exerce en fait des pouvoirs qui lui sont conférés par la loi, en vertu d'une désignation par le Procureur général du Canada ou le ministre de la Santé nationale et du Bien-être, selon le cas. Il n'exécute pas une ordonnance ou un jugement de la Cour de l'Échiquier du Canada ou d'un des juges de cette cour. Dans sa sagesse, le Parlement a décidé que le pouvoir conféré à un tel agent doit être attesté par un bref délivré par la Cour de l'Échiquier du Canada et la cour doit se plier à cette directive légale[121].

93. Les restrictions concernant les «motifs raisonnables», apportées à l'utilisation des mandats de main-forte au Canada en matière de stupéfiants et de drogues, ont eu des effets plus importants. Aux termes des mandats eux-mêmes, le détenteur peut effectuer des perquisitions «à toute heure». Leur usage est cependant régi par les paragraphes 10(1) de la *Loi sur les stupéfiants* et 37(1) de la *Loi des aliments et drogues*. Comme tout agent exerçant les autres pouvoirs de perquisition sans mandat prévus par ces dispositions, le détenteur d'un mandat de main-forte doit avoir des motifs

raisonnables de croire que des stupéfiants se trouvent dans le lieu où il entend perquisitionner. De plus, des directives internes obligent en pratique les agents de la G.R.C. à remettre un rapport chaque fois qu'ils se sont prévalus d'un mandat de main-forte, pour y donner après le fait les raisons justifiant le recours à cette procédure. Mais ces directives sont la conséquence de lignes de conduite administratives et n'ont pas été incorporées dans un texte de loi.

94. Ce n'est pas du tout à cause de ses fonctions originelles que le mandat de main-forte s'est maintenu. Au Canada, le mandat de main-forte indique sans doute encore de nos jours, en pratique, le pouvoir du détenteur de pratiquer des perquisitions et des saisies mais il ne sert sûrement pas à attester l'identité d'un agent fédéral auprès d'un agent de la localité. Et ce qui est plus important, il ne sert plus du tout à demander «main-forte»: les agents de la Gendarmerie royale du Canada n'y recourent pas en vue d'obtenir l'assistance de leurs collègues provinciaux ou municipaux. En fait, c'est plutôt l'inverse qui se produit à notre époque: en vertu de certaines ententes administratives, il est arrivé que des agents de la G.R.C. détenteurs de mandats de main-forte soient mis à la disposition d'agents municipaux souhaitant recourir aux pouvoirs spéciaux conférés par ce mandat à l'occasion de perquisitions entreprises à l'échelon local[122]. Un agent de la G.R.C. ayant joué ce rôle se décrivait lui-même comme un «mandat de perquisition ambulant[123]».

95. De nos jours, le mandat de main-forte est plutôt conçu comme un mode d'autorisation offrant une réponse expéditive aux urgences inhérentes à l'application des lois sur les stupéfiants et les drogues. Dans un communiqué de presse de 1978, le ministre de la Justice de l'époque, Ron Basford, parlait de la [TRADUCTION] «clandestinité et de la facilité du transport et de la vente des drogues illicites» qui, selon lui, «justifient le recours à des mesures extraordinaires[124]». Le rôle essentiel du mandat de main-forte est de désigner une catégorie d'agents de la paix qui auront exclusivement le pouvoir de mettre ces mesures en œuvre.

IV. Le cadre constitutionnel

96. Deux aspects du droit constitutionnel canadien ont une incidence sur notre conception du droit des perquisitions et des saisies: (1) les limites de la compétence fédérale, et (2) la *Charte canadiennes de droits et libertés*.

A. La compétence fédérale

97. Conformément au mandat de la Commission de réforme du droit du Canada, le document de travail ne doit traiter que de sujets de compétence constitutionnelle fédérale. Pour l'essentiel, cette restriction ne met un frein ni à l'étude présentée dans le présent document, ni aux propositions qui y sont faites. Aux termes du paragraphe 91(27) de la *Loi constitutionnelle de 1867*, le Parlement du Canada a compétence exclusive dans tous les domaines relevant de ce qui suit:

> La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle mais y compris la procédure en matière criminelle.

Cette catégorie comprend de toute évidence le sujet principal du présent document: les dispositions en matière de perquisition et de saisie visant à l'application du droit criminel. Toutes les dispositions étudiées dans le présent document, sauf une, figurent au *Code criminel*. Les nouvelles règles proposées dans la deuxième partie sont conçues comme un élément d'un code de procédure pénale.

98. Parmi les dispositions dont traite le présent document, les seules à ne pas figurer dans le *Code criminel* actuel sont celles qui ont trait aux stupéfiants et aux drogues. Dans l'affaire *Hauser*, il est vrai, la Cour suprême du Canada a majoritairement conclu que la *Loi sur les stupéfiants* avait été validement adoptée par le Parlement du Canada en vertu de son pouvoir résiduaire général et non en vertu de son pouvoir spécifique en matière criminelle établi au paragraphe 91(27)[125]. Sans mettre en doute le bien-fondé de la décision de la majorité, nous considérons que les pouvoirs de perquisition et de saisie en matière de stupéfiants et de drogues ont suffisamment de liens avec le droit criminel pour que leur inclusion dans le présent document soit justifiée. En effet, certains des pouvoirs institués par la *Loi sur les stupéfiants* et la *Loi des aliments et drogues* sont, tout comme les pouvoirs de perquisition et de saisie prévus par le *Code criminel*: (1) exercés par la police, (2) en réaction (3) à des infractions pouvant faire l'objet de poursuites de la façon prévue au *Code criminel*, et notamment par voie d'acte d'accusation[126]. Compte tenu de ces caractéristiques, il devient secondaire pour nos fins de savoir si, sur le plan constitutionnel, les lois relatives aux stupéfiants et aux drogues font partie du droit criminel. L'essentiel, c'est de savoir si des motifs quelconques peuvent justifier l'existence de règles différentes pour les perquisitions régies par la *Loi sur les stupéfiants* et par la *Loi des aliments et drogues* par rapport aux perquisitions

relatives à des infractions du *Code criminel*. Quoi qu'il en soit, il convient de le souligner, l'arrêt *Hauser* n'a pas nié la compétence fédérale en matière de stupéfiants et de drogues. Il y a seulement été décidé que la compétence fédérale dans ce domaine n'est pas fondée sur le paragraphe 91(27), mais a un autre fondement plus général.

99. La limitation de la portée du présent document aux domaines de compétence fédérale a tout de même une conséquence importante: le problème se pose à l'endroit des lois provinciales de nature réglementaire dont la mise en application relève du droit criminel. C'est tout particulièrement le cas des dispositions touchant le contrôle des boissons alcooliques et la circulation routière, qui confèrent aux agents de la paix le pouvoir de pratiquer des perquisitions et des saisies. Ce pouvoir s'exerce le plus souvent sur des véhicules automobiles[127]. Ces dispositions ont manifestement été conçues pour les fins de la loi où elles se trouvent; mais en pratique, elles autorisent les agents de la paix à effectuer des contrôles reliés de façon beaucoup plus large à l'application de la loi[128]. Il est peut-être illusoire de demander aux agents de la paix de faire abstraction de leur formation et de leurs habitudes en matière d'application de la loi lorsqu'ils se livrent à des activités prévues par des lois provinciales; mais il importe de reconnaître la gamme des possibilités qui s'offrent à eux par suite de ces sources additionnelles de pouvoirs. Comme la réforme des lois provinciales dépasse le cadre du présent document, nous ne pouvons qu'inciter fortement les autorités provinciales à étudier l'interprétation et l'utilisation des pouvoirs de perquisition et de saisie qu'elles ont instaurés. Il est impossible de résoudre de façon parfaite tous les problèmes découlant des pouvoirs de perquisition et de saisie de la police par des propositions qui visent uniquement les lois fédérales.

B. La *Charte canadienne des droits et libertés*

100. L'article 8 de la *Charte canadienne des droits et libertés* traite des perquisitions et des saisies dans les termes suivants:

> Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Dans une large mesure, l'étude des conséquences de cette disposition est fondée sur des hypothèses car lors de la rédaction du présent document, la *Charte* n'avait pas encore été interprétée par les

tribunaux. Deux aspects de cette disposition sont pertinents pour notre propos: (1) l'interprétation susceptible d'être donnée par les tribunaux canadiens au critère constitutionnel des «motifs raisonnables», et (2) les conséquences particulières que cette disposition pourrait avoir à l'égard des atteintes avec mandat et sans mandat[129].

(1) *L'application du critère des «motifs raisonnables»*

101. La protection constitutionnelle contre les «fouilles, les perquisitions ou les saisies abusives» semble prévoir la possibilité de l'application par les tribunaux du critère des motifs raisonnables à deux niveaux bien distincts. En premier lieu, cette disposition pourrait autoriser les tribunaux à limiter ou à déclarer inopérantes les lois qui dérogent au critère des motifs raisonnables. En second lieu, elle semble prévoir l'ouverture de recours contre les actions de la police présentant un caractère abusif.

102. Est-il approprié que les tribunaux puissent invalider des lois ou en restreindre l'application lorsqu'elles heurtent leur interprétation des principes constitutionnels? Une réponse négative a été donnée à cette question dans les sphères politiques et universitaires[130]. Il est toutefois improbable que les tribunaux canadiens s'abstiennent de jouer ce rôle lorsqu'ils le jugeront approprié. Dès les débuts de la Confédération, la Cour suprême a manifesté son intention d'invalider les lois adoptées par un palier du gouvernement qui, selon l'*Acte de l'Amérique du Nord britannique*, n'avait pas compétence pour ce faire. [TRADUCTION]«Tous présumaient tacitement» que les tribunaux exerçaient ce rôle «à bon droit[131]». La *Charte canadienne des droits et libertés*, sous réserve des lois adoptées en vertu de la clause «nonobstant», permises par l'article 33, énonce un groupe de droits essentiels qui font désormais partie de la Constitution. Certaines lois peuvent dès lors être exorbitantes de la compétence législative de tous les paliers de gouvernement au Canada. Lorsqu'un tribunal jugera que des dispositions légales appartiennent à cette catégorie interdite, on peut s'attendre qu'il se prévaudra de son pouvoir de les déclarer invalides.

103. La façon dont a été interprétée la *Déclaration canadienne des droits* donne également des indices sur l'attitude possible des tribunaux à l'égard des dispositions en matière de perquisition et de saisie. Depuis l'arrêt *La Reine* c. *Drybones*, la Cour suprême s'est, en théorie, réservé deux pouvoirs: interpréter restrictivement les dispositions susceptibles de contrevenir à la *Déclaration* lorsqu'il est

possible, de cette façon, de considérer qu'elles ne transgressent pas les interdictions énoncées par cette dernière et rendre inopérantes les dispositions qu'il est impossible d'interpréter de cette façon[132]. La Cour a toutefois eu tendance à affirmer de façon générale l'existence de ces pouvoirs mais à s'abstenir de les exercer dans des cas précis.

104. Cette réticence provenait, du moins en partie, de ce que la *Déclaration des droits* ne faisait pas partie de la Constitution[133]. En revanche, la *Charte* fait partie intégrante de la Constitution, qui est régie par le paragraphe 52(1) de la *Loi constitutionnelle*:

> La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Une chose est claire: l'enchâssement des libertés individuelles dans la *Charte* devrait inciter la Cour à aborder la question sous un autre angle. Elle devra désormais se considérer comme un organisme judiciaire chargé d'appliquer les interdictions véritablement constitutionnelles visant les lois qui portent atteinte aux droits et libertés individuels.

105. La jurisprudence américaine peut fournir quelques indications préliminaires quant aux conséquences possibles de la *Charte* à cet égard. Le quatrième amendement à la Constitution des États-Unis traite des perquisitions et des saisies:

> Le droit des citoyens d'être protégés dans leurs personnes, leurs maisons, leurs papiers et leurs effets et d'être mis à l'abri de toutes perquisitions et saisies déraisonnables, ne pourra être violé, et il ne pourra être lancé de mandats de perquisition ou de saisie que pour une cause plausible, appuyée par le serment ou l'affirmation des plaignants; le mandat devra toujours contenir la description du lieu où doit se faire la perquisition, ainsi que celle des personnes ou des choses qui doivent être saisies[133a].

Si la deuxième partie de cette disposition, où sont définis les critères applicables aux mandats, n'a été reproduite d'aucune façon dans l'article 8 de la *Charte*, la rédaction de la première partie, où est garanti le droit «d'être mis à l'abri de toutes perquisitions et saisies déraisonnables», ressemble de façon frappante au texte de la disposition canadienne. Parmi les décisions américaines où a été interprétée la première partie du quatrième amendement, on trouve un bon nombre de cas où la constitutionnalité d'une loi avait été contestée au motif qu'elle ne satisfaisait pas au critère des «motifs raisonnables».

106. Un bon exemple est l'affaire *Ybarra* v. *Illinois*. La Cour suprême des États-Unis devait se prononcer sur l'application d'une

disposition d'un État autorisant la fouille des personnes trouvées dans des lieux où une perquisition était effectuée en vertu d'un mandat de perquisition. La Cour en est arrivée à la conclusion suivante: lorsqu'une fouille de personne n'était pas en soi fondée sur des motifs raisonnables ayant trait à la personne fouillée, elle constituait une violation de la protection offerte par le quatrième amendement contre les perquisitions et saisies déraisonnables[134]. Essentiellement, la Cour a interprété la loi de façon suffisamment stricte pour la rendre conforme au quatrième amendement. Mais dans les cas où la législation attaquée contrevenait de façon tellement évidente au quatrième amendement qu'elle rendait une telle interprétation restrictive impossible, la Cour suprême l'a invalidée. Dans l'affaire *Payton* v. *New York* par exemple, elle a récemment annulé une loi autorisant l'entrée sans mandat en un lieu en vue d'effectuer des arrestations pour le motif que pareilles atteintes sont [TRADUCTION] «selon toute apparence déraisonnables[135]».

107. Quant à la possibilité d'obtenir réparation à la suite d'actions policières, elle dépendra en grande partie des modalités suivant lesquelles les citoyens pourront porter plainte au sujet d'une perquisition ou d'une saisie qui leur a causé préjudice, ou la contester. Ces modalités seront étudiées plus loin dans le présent document de travail[136]. Pour le moment, bornons-nous à souligner que la protection constitutionnelle offerte par l'article 8 de la *Charte* sera probablement interprétée non seulement comme une limitation du pouvoir législatif, mais également comme le fondement des demandes de réparation à la suite d'actions policières présentant un caractère «abusif».

108. Cette perspective correspond dans une certaine mesure à un raffinement des protections légales déjà existantes. Le critère des motifs raisonnables sous-tend déjà la grande majorité des règles de common law et des textes législatifs à la source des pouvoirs de perquisition et de saisie sans mandat. En ce qui concerne par exemple certains aspects de la perquisition, tels que l'emploi de la force, le préavis et l'ordre de rester immobile, les agents de la paix doivent de façon générale s'en tenir à des actes raisonnables dans les circonstances[137]. En droit anglo-canadien, les motifs «raisonnables» constituent le critère fondamental pour déterminer la légitimité des actions policières; comme le disait Lord Devlin, [TRADUCTION] «les policiers doivent normalement s'en tenir à des actes raisonnables et pourvu qu'ils le fassent, il est peu probable que l'accusé ... insiste pour faire valoir son droit à l'immunité contre les perquisitions[138]».

109. En revanche, il pourrait arriver que, par suite de l'instauration d'une disposition constitutionnelle, le critère des motifs raisonnables soit appliqué à des activités policières qui auparavant y échappaient. Dans certains cas, cette situation exceptionnelle résultait d'une disposition légale précise. Le paragraphe 10(4) de la *Loi sur les stupéfiants*, par exemple, semble donner aux agents de la paix toute latitude pour forcer portes, fenêtres, planchers, tuyauterie, compartiments et tous autres objets sans avoir à se justifier par des motifs raisonnables. Si l'on en venait à la conclusion que la garantie constitutionnelle restreint l'effet de telles dispositions, cela pourrait également influer sur le droit des personnes lésées d'obtenir réparation.

(2) *Les perquisitions et saisies avec mandat et sans mandat*

110. L'article 8 de la *Charte canadienne des droits et libertés* traite des perquisitions et saisies en général, sans faire de distinction entre les modes d'autorisation de perquisitions ou saisies sans mandat et avec mandat. On peut l'opposer à cet égard au quatrième amendement à la Constitution américaine, lequel énonce des critères particuliers pour le cas des perquisitions avec mandat: «il ne pourra être lancé de mandat de perquisition ou de saisie que pour une cause plausible, appuyée par le serment ou l'affirmation ....» Deux conséquences découlent de l'absence d'une clause analogue dans la disposition canadienne.

111. Premièrement, il se pourrait que sur le plan constitutionnel, les tribunaux canadiens ne manifestent pas la même préférence pour les mandats que celle qui a marqué le droit américain. S'il convient d'établir une distinction entre l'interdiction générale des perquisitions «déraisonnables» exprimée au début du quatrième amendement et la définition, dans sa deuxième partie, de critères applicables aux mandats, il n'en reste pas moins que nombre de tribunaux américains, considérant cet amendement comme un tout, ont lié les critères des «motifs raisonnables» à la protection offerte par les modalités du mandat:

> [TRADUCTION]
> La règle constitutionnelle fondamentale dans ce domaine est la suivante: «les perquisitions effectuées hors du cadre judiciaire, sans autorisation préalable d'un juge ou d'un magistrat sont en soi déraisonnables au sens du quatrième amendement — sauf quelques exceptions prévues de façon spécifique et précisément définies»[139].

S'il n'est pas inimaginable qu'une préférence de cette nature pour le mandat puisse être manifestée par les tribunaux canadiens, elle ne pourrait s'appuyer sur le texte de l'article 8 de la *Charte*.

112. Deuxièmement, il risque d'y avoir un écart entre le critère constitutionnel fondamental, applicable au mandat de perquisition, et des exigences plus élaborées imposées par des textes de loi. On peut croire que le «caractère judiciaire» des modalités du mandat est implicitement contenu dans le critère constitutionnel. C'est en abordant la question sous l'angle du rôle «judiciaire» de la personne qui délivre le mandat que la jurisprudence canadienne s'est penchée sur le «caractère raisonnable» des motifs de croire mentionnés au mandat[140]. Mais en revanche, le lien est moins évident entre le critère des «motifs raisonnables» et les caractéristiques de «spécificité» élaborées en droit canadien. Prenons le cas d'une perquisition pratiquée en vertu d'un mandat entaché d'un vice de forme mais fondée sur une dénonciation présentant des motifs raisonnables; cette perquisition pourrait sans doute être jugée à la fois raisonnable et interdite en droit.

(3) *Conclusion*

113. L'article 8 de la *Charte canadienne des droits et libertés* a une incidence sur de nombreux aspects du présent document de travail. Nous tiendrons compte du critère des «motifs raisonnables» dans notre étude des règles actuellement en vigueur en matière de perquisition et de saisie sans mandat, et également dans notre description critique des pratiques policières dans ce domaine, pour autant que ces dernières puissent faire l'objet d'une juste description. La disposition constitutionnelle forme également la base de toute réforme législative. C'est pourquoi, dans la deuxième partie de ce document, nous nous y référons constamment pour élaborer de nouvelles règles en matière de perquisition et de saisie, pour en donner la justification et pour concevoir les modalités de ce nouveau régime.

CHAPITRE DEUX

La situation actuelle

114. C'est principalement par des textes de loi que s'est effectué le développement des pouvoirs de perquisition et de saisie au Canada. De nombreuses traditions de common law originaires d'Angleterre y ont survécu mais depuis la Confédération, on a utilisé le mécanisme législatif pour instituer de nouveaux pouvoirs. Ce fait est attribuable à la concomitance des initiatives parlementaires et de la réticence des tribunaux. À cause de la prolifération des textes législatifs au Canada, les tribunaux n'ont, pour l'essentiel, pas eu besoin d'élargir les pouvoirs de perquisition de common law. Et même lorsqu'ils ont pu constater des lacunes dans les textes de loi, ils ont hésité à instituer de nouveaux pouvoirs pour remédier aux problèmes découlant de ces lacunes[141].

115. Cette attitude canadienne est très différente de celle des tribunaux anglais. Ces derniers, lorsqu'ils ont fait face à des lacunes législatives (et notamment la parfaite absence d'un pouvoir de perquisition relatif aux preuves d'un crime), ont fait des pieds et des mains pour élargir les pouvoirs de common law afin de répondre aux exigences de la police. La décision rendue en 1970 dans l'affaire *Ghani* v. *Jones* représente l'étape la plus importante de cette expansion. Il y a été institué un pouvoir général de perquisition de common law pour les «infractions graves», avec diverses restrictions ayant trait par exemple à la nature des objets recherchés et aux soupçons sur la participation de la personne visée par l'atteinte[142]. Les tribunaux ont ainsi été forcés d'improviser de façon continue, ce qui a mené à une incertitude considérable et a provoqué la critique[143]; la "Royal Commission on Criminal Procedure" a recommandé récemment que les pouvoirs d'entrée et de perquisition en un lieu soient établis par des dispositions légales[144]. Comme il peut s'appuyer

sur des règles qui sont principalement établies dans des textes de loi, le droit canadien a tout au moins pu échapper à certains des problèmes auxquels on a fait face en Angleterre.

I. Le common law

116. Le common law reconnaît encore deux catégories principales de perquisitions ou saisies en droit criminel. Il s'agit du pouvoir de perquisition et de saisie accessoire à l'arrestation et de la possibilité d'effectuer des perquisitions de consentement. Il convient également de mentionner le pouvoir d'entrer en un lieu afin d'empêcher que soit mis en danger la vie ou la sécurité de personnes.

A. L'arrestation

(1) *Historique*

117. On fait souvent remonter au tout début du common law le pouvoir des agents de la paix de fouiller une personne au moment de son arrestation; il est des décisions qui font état de l'existence «certaine» de ce pouvoir en common law[145]. En pratique, ces fouilles sont manifestement antérieures à la formulation de tout principe les autorisant, et l'on peut dire avec une relative certitude qu'au fil des siècles, ces fouilles ont tout simplement été considérées comme justes et valides. Cela provient en grande partie de la tolérance traditionnelle envers les actes constituant des atteintes, même violentes, aux droits des personnes accusées de crime. En outre, les objets habituellement saisis lors d'une arrestation, par exemple les sacs de monnaie et les armes, pouvaient habituellement être trouvés sans une fouille approfondie de la personne[146].

118. À la lecture des lois anglaises adoptées au début du dix-huitième siècle, l'existence du pouvoir de fouiller les personnes au moment de leur arrestation est évidente. Par exemple, le constable qui arrêtait une personne soupçonnée de transporter des biens volés avait le pouvoir de remettre ces biens à un juge de paix[147]; le pouvoir

d'effectuer une fouille pour trouver de tels biens n'était pas un pouvoir exprès, mais il allait de soi si l'on voulait découvrir des biens dissimulés d'une façon quelconque. On pourrait croire que ce pouvoir de fouiller les personnes arrêtées, dont la source était tellement vague, allait être contesté devant les tribunaux; pourtant, on ne trouve dans les recueils de jurisprudence aucune décision à ce sujet avant le dix-neuvième siècle. En vérité, les premières affaires où des prisonniers se plaignaient des actes de fouille et de saisie des policiers portaient non sur la légalité d'une telle fouille, mais plutôt sur l'importance de la saisie pratiquée par la police. Dans l'affaire *O'Donnell*[148], par exemple, le tribunal réprouve la pratique policière consistant à priver les prisonniers de l'argent trouvé sur eux lorsqu'il n'existe aucun lien entre cet argent et des biens prétendument volés. Mais la légalité de la fouille pratiquée pour trouver l'argent ne semble pas, elle, avoir fait l'objet d'une contestation.

119. On en est cependant venu à reconnaître que la fouille d'une personne faite accessoirement à son arrestation constituait une atteinte à ses droits et devait par le fait même faire l'objet de règles. C'est l'année 1853 qui marque l'étape décisive à cet égard, avec l'importante décision rendue dans l'affaire *Bessell* v. *Wilson*[149]. Émettant une opinion incidente, à la fin d'un procès pour emprisonnement illégal, le lord juge en chef Campbell critiqua avec virulence la manière dont la police avait fouillé le demandeur lors de son arrestation. Une telle fouille, déclara Lord Campbell, doit être justifiée par les circonstances et pareille justification n'existait pas: le demandeur était un marchand, l'arrestation avait été effectuée par suite d'une action en matière de droit d'auteur et pratiquement rien ne pouvait prêter à croire que le demandeur pût avoir dissimulé une arme sur lui. Cette règle de conduite a été reprise dans l'affaire *Leigh* v. *Cole*, où était poursuivi pour voies de fait un chef de police à qui le demandeur reprochait de l'avoir arrêté, battu et fouillé. Dans ses directives au jury sur la légalité de la fouille, le juge Williams dit notamment ceci:

> [TRADUCTION]
> Lorsqu'il s'agit d'un prisonnier, il ne fait aucun doute qu'eu égard à la violence manifestée dans ses propos ou son comportement un agent de police est fondé à juger prudent et opportun de le fouiller afin de s'assurer qu'il ne porte pas d'arme avec laquelle il pourrait blesser quelqu'un ou attenter à l'ordre public; mais il serait d'autre part absolument faux de prétendre qu'une règle générale puisse être appliquée dans de tels cas[150].

120. Avec le temps, la règle relative à la fouille des prisonniers a subi quelques légères modifications. Aux États-Unis, la règle

traditionnelle, énoncée dans le *Corpus Juris*, exprime ce pouvoir de fouille dans des termes généraux:

> [TRADUCTION]
> Après une arrestation, l'agent de la paix a le droit de fouiller le prisonnier, de le dévêtir si c'est nécessaire, de lui enlever et de tenir à la disposition du tribunal de première instance tout bien qu'il croit de bonne foi avoir un rapport avec l'infraction reprochée, de même que tout bien pouvant servir de preuve contre l'accusé ou pouvant donner des indices quant à la perpétration du crime ou quant à l'identité du criminel, et toute arme ou instrument susceptible de permettre au prisonnier de commettre un acte violent ou de s'évader[151].

Quelques décisions canadiennes ont reconnu l'autorité de cet énoncé[152]. En revanche, la règle plus restreinte exprimée dans l'affaire *Leigh* v. *Cole* est aussi citée par les tribunaux canadiens. Du reste, la distinction entre les deux conceptions est dans une large mesure théorique: on ne trouve dans la jurisprudence canadienne contemporaine aucun cas où la fouille d'une personne arrêtée ait été considérée comme une précaution «abusive».

(2) *L'arrestation et la mise sous garde*

121. Les règles actuelles régissant la fouille des personnes arrêtées suscitent de nombreuses questions. Tout d'abord, un problème de définition: à quelles étapes de l'arrestation et de la détention d'une personne le pouvoir de fouille s'applique-t-il? La règle énoncée dans l'affaire *Leigh* v. *Cole* parle du «prisonnier»; dans de nombreuses affaires, les tribunaux canadiens ont eu recours à la jurisprudence traditionnelle pour déclarer valides des perquisitions pratiquées dans des postes de police et des établissements carcéraux. À l'autre extrême, on retrouve des cas où la perquisition se produit à toutes fins utiles au moment du contact initial entre l'agent de la paix et le suspect. Dans l'affaire *Brezack*, par exemple, on trouve la description suivante d'une fouille effectuée pour découvrir de la drogue:

> [TRADUCTION]
> Au moment où l'appelant approchait du Golden Grill, les constables, sur la foi des renseignements qu'ils avaient obtenus, ont quitté l'endroit où ils s'étaient dissimulés et, avec deux autres constables, se sont précipités sur lui. L'un d'eux saisit l'appelant par le bras, tandis que le constable Macauley le prit à la gorge, pour l'empêcher d'avaler ce qu'il pouvait avoir dans la bouche .... Le constable Macauley a tenté à maintes reprises de s'introduire le doigt

dans la bouche de l'appelant, afin d'y prendre la drogue qu'il supposait s'y trouver, mais à chaque tentative, l'appelant lui a mordu le doigt. Grâce à la force déployée par les constables, le constable Macauley est enfin parvenu à s'introduire les doigts dans la bouche de l'appelant, pour constater qu'il ne s'y trouvait pas de drogue[153].

En pratique, les agents de la paix peuvent effectuer des fouilles de personnes aux deux stades: dans le premier cas, la fouille vise à faciliter l'arrestation initiale, dans le second, à protéger à la fois la personne détenue et l'établissement carcéral où elle est emprisonnée.

122. Dans une certaine mesure, il semble s'agir encore là d'un problème théorique: les tribunaux canadiens ont manifesté de façon évidente leur réticence à établir une distinction entre les arrestations «avec mise sous garde» et les autres types d'arrestation[154]. Selon cette conception, l'accusé est sous garde dès son arrestation. Mais il faut avoir soin de ne pas mettre sur le même pied les fouilles pratiquées à la suite d'une arrestation, dans le cadre d'une enquête, et les fouilles de prisonniers destinées à maintenir l'ordre dans les pénitenciers, les prisons et les autres établissements carcéraux. On trouve par exemple dans le *Règlement sur le service des pénitenciers* une disposition autorisant le personnel de l'institution à fouiller les détenus, les membres du personnel et les visiteurs[155]. Contrairement aux pouvoirs de la police, dont c'est une caractéristique, la fouille prévue par cette disposition ne constitue pas une réaction immédiate à un crime. Elle vise à assurer la sécurité au sein de l'établissement où le détenu est incarcéré. Le présent document traite uniquement des fouilles pratiquées par la police immédiatement après l'arrestation d'un présumé délinquant.

(3) *L'étendue de la fouille et de la saisie*

123. Au Canada, les limites du pouvoir de fouille et de saisie accessoire à l'arrestation ne sont pas définies de façon précise. En ce qui concerne l'étendue de la fouille, il paraît indiscutable que la fouille corporelle est permise; quant à savoir jusqu'à quel point elle peut être intime et quel degré de force peut être employé, ces questions sont régies par le critère suivant: [TRADUCTION] «ce qui est raisonnable et approprié dans ... l'ensemble des circonstances de l'affaire[156]». En fait, on ne relève dans la jurisprudence canadienne publiée que très peu de décisions où des mesures prises par des agents de police ont été jugées illégales pour ces motifs. L'affaire *McDonald and Hunter*, par exemple, représente une des exceptions à la règle. Deux agents de police avaient arrêté un vétéran souffrant de

paralysie partielle et l'avait jeté au sol pour tenter de saisir des objets qui se trouvaient sur lui; le tribunal en vint à la conclusion que les policiers avaient employé plus de force qu'il n'était nécessaire[157].

124. Il est généralement admis que le pouvoir de fouille accessoire à l'arrestation s'étend aux lieux dont l'accusé a le contrôle. On trouve dans le *Rapport du Comité canadien de la réforme pénale et correctionnelle* le passage suivant:

> Lorsqu'une personne a été arrêtée, avec ou sans mandat, le droit de perquisition porte non seulement sur sa personne mais aussi sur les lieux dont elle a le contrôle. Dans le monde moderne, le droit de fouiller les lieux porte aussi, évidemment, sur un véhicule ou autre moyen de transport dont l'accusé a le contrôle[158].

La jurisprudence canadienne sur cette question est très rare[159] et nombre de problèmes ne sont pas encore résolus. Les lieux dont l'accusé «a le contrôle» se limitent-ils aux endroits qui sont dans son voisinage immédiat? Ou même, se limitent-ils à sa résidence ou à l'endroit où on le retrouve? Certaines décisions anglaises ont exprimé une conception large de ce pouvoir[160], mais il n'est pas du tout certain qu'elles soient vraiment applicables en droit canadien. En effet, si les tribunaux britanniques ont donné une portée plus grande au pouvoir de fouille accessoire à l'arrestation, c'est, du moins en partie, pour pallier l'absence, en droit criminel, d'un mandat d'application générale.

125. On peut également se demander s'il existe des limites quant aux objets que peut saisir l'agent en effectuant une arrestation. Selon de vieilles décisions anglaises déjà mentionnées, l'argent qui n'avait aucun rapport avec l'infraction reprochée ne pouvait être enlevé à un prisonnier[161]. En droit canadien, ce principe a connu une extension: les policiers ne peuvent saisir d'autres objets sur le prisonnier, à moins que l'État ne puisse y démontrer un intérêt légitime. C'est ainsi que dans l'affaire *McDonald and Hunter*, il a été décidé que les agents accusés n'avaient pas le droit d'enlever à une personne, contre sa volonté, son insigne de vétéran[162].

B. Le consentement

126. La tolérance manifestée en common law à l'égard des fouilles «de consentement» a un fondement différent de celui des autres pouvoirs de fouille, de perquisition et de saisie. En effet, ces

pouvoirs constituent normalement une exception à l'interdiction de se livrer à des actes susceptibles de porter atteinte aux droits de la personne, cette exception étant justifiée dans l'intérêt de l'application de la loi. Mais dans le cas de la fouille «de consentement», la justification repose sur l'idée que la «fouille» pratiquée ne constitue pas, en réalité, une atteinte susceptible de donner lieu à une poursuite. Il s'agit là d'une application du principe de common law: *volenti non fit injuria*:

> [TRADUCTION]
> La personne qui provoque un acte exercé à son égard ou qui y consent ne peut, si elle en subit un préjudice, intenter une poursuite en alléguant qu'il y a eu atteinte à ses droits[163].

Le consentement d'une personne aux actes du policier entraîne, selon ce principe, sa renonciation aux droits d'invoquer les protections légales habituelles contre les atteintes à ses droits causées par de tels actes. Ce consentement a en fait été considéré comme une entente privée entre individus; certaines questions de droit public, par exemple l'existence de motifs suffisants pour justifier les actes de l'agent et le respect de certaines formalités préalables à la fouille, deviennent par conséquent inapplicables[164].

127. À en juger par les décisions connues, les fouilles «de consentement» ne semblent soulever, il faut le souligner, que très peu de litiges. Cela peut s'expliquer par de nombreuses raisons: l'absence traditionnelle, en droit de la preuve canadien, d'un principe d'exclusion, la possibilité que dans les cas où il y a consentement, les policiers agissent de façon moins préjudiciable, et l'improbabilité que des personnes ayant donné leur consentement à des actes d'agents de la paix viennent par la suite contester la légalité de ces mêmes actes. Les décisions portant sur des fouilles, l'affaire *Reynen* v. *Antonenko*[165] par exemple, dans laquelle a été soulevée la question de la collaboration, n'apportent souvent que très peu de lumière sur ce problème; elles se bornent à trancher la question de savoir si la personne a apporté sa collaboration aux actes des policiers. Les règles relatives aux fouilles «de consentement» doivent donc être puisées dans les règles générales sur le consentement. À certains égards, cela est malheureux; l'existence d'une enquête policière vient placer dans un nouveau contexte de nombreux aspects de la question. Parmi ces aspects, mentionnons la notion de consentement véritable, limité et donné en toute connaissance de cause, la difficulté d'établir l'existence du consentement, et peut-être avant tout, la question du consentement donné par une personne autre que le suspect lui-même. Alors que ces problèmes ont été fréquemment traités dans la

jurisprudence américaine sur le quatrième amendement, ils ont à peine été abordés au Canada dans le domaine des règles sur les perquisitions et saisies.

128. Cela ne veut pas dire qu'il n'existe aucun principe directeur susceptible d'aider les agents de la paix canadiens à résoudre ces problèmes en pratique. Certaines forces policières ont établi leurs propres lignes de conduite en vue de guider les agents qui souhaitent effectuer des fouilles «de consentement», particulièrement lorsqu'il s'agit de perquisition dans des lieux. Certaines divisions de la Gendarmerie royale du Canada, par exemple, demandent à leurs agents d'employer des formules de consentement qui peuvent mettre la personne au fait de son droit de refuser de donner son consentement et fournir une preuve de ce consentement si la question est soulevée par la suite. Mais c'est de façon purement discrétionnaire que les forces de police ont adopté de telles pratiques, ce qui met en évidence les graves lacunes du droit canadien à cet égard.

C. L'entrée dans des lieux afin de protéger la vie et d'assurer la sécurité

129. Dans son rapport, le Comité canadien de la réforme pénale et correctionnelle disait:

> Nous sommes d'avis qu'un agent de police a présentement le droit de pénétrer sans mandat et, au besoin par la force, dans des locaux, y compris une maison d'habitation, dans le but de prévenir la commission d'une infraction qui causerait un préjudice grave et immédiat à quelqu'un s'il croit en se fondant sur des «motifs raisonnables et probables» qu'on est sur le point de commettre une telle infraction[166].

Ce pouvoir semble lié aux fonctions plus étendues confiées à l'origine à l'agent de la paix. Il était en effet gardien de la paix, rôle qui est défini de nos jours aux articles 29 et 30 du *Code criminel*. Bien sûr, certains aspects préventifs de ce rôle de gardien de la paix n'appartiennent pas au domaine de l'application du droit criminel et nous n'avons donc pas à nous y arrêter dans le présent document; mais ce rôle concerne également la répression des violations criminelles violentes de la paix, par exemple les voies de fait. En droit anglo-canadien, de telles violations de la paix, décrites par le terme archaïque "affrays" (bagarre), sont considérées comme suffisamment urgentes pour justifier l'entrée immédiate des policiers dans des lieux

privés. Pour certains, ce pouvoir d'entrer dans des lieux est lié à l'arrestation éventuelle des «fauteurs de troubles». Mais ce n'est pas la perspective d'une arrestation qui justifie ce pouvoir; c'est plutôt le maintien de la paix[167]. Dans une décision canadienne récente, on a toutefois parlé de ce pouvoir comme s'il s'exerçait dans le cadre d'une enquête: deux agents de police poursuivis pour "trespass" ont pu invoquer, pour leur défense, le fait qu'ils «faisaient enquête à la suite d'une plainte» relative à une «atteinte possible à l'ordre public[168]».

130. Permettant à l'agent de la paix de pénétrer sans mandat dans des lieux afin de délivrer des personnes illégalement détenues, ce pouvoir pouvait donc être considéré, sous cet aspect, comme un pouvoir de perquisition et de saisie sans mandat. Il est également permis de penser qu'il permettait de pénétrer dans un lieu afin de désarmer les personnes qui possédaient une arme à feu dans des circonstances dangereuses. Mais vu l'imprécision de ce pouvoir, les policiers ne le considéraient pas comme un mécanisme d'autorisation fiable. C'est en partie à cause de cette incertitude qu'a été adopté le paragraphe 101(2) du *Code criminel*; aux termes de ce dernier, il peut y avoir, à l'égard des armes, perquisition et saisie sans mandat. À ce sujet, voici un extrait d'un rapport récent préparé pour le Solliciteur général sur les mesures législatives relatives au contrôle des armes à feu:

> Les agents de la paix ont souvent procédé à des perquisitions et à des saisies sans mandat dans des situations manifestement dangereuses. Mais ils devaient s'appuyer sur la common law qui, parfois, ne précisait pas en vertu de quelle autorité ces actes étaient posés. Ce paragraphe supprime maintenant toute ambiguïté quant à leur légalité[169].

L'adoption du paragraphe 101(2) semble avoir éliminé le recours au pouvoir de common law dans ce but.

II. Les pouvoirs fondés sur une disposition législative

131. La croissance des pouvoirs de perquisition et saisie fondés sur une disposition législative a son origine dans des lois anglaises adoptées dans les premiers jours de la Restauration. Avec le mouvement d'affirmation de la souveraineté du Parlement, le recours

au common law pour étendre ces pouvoirs a été arrêté[170]. D'ailleurs, avec l'abolition de la Chambre étoilée en 1641 et l'émasculation subséquente des proclamations royales, c'est la législation qui devenait le mode principal d'expression de tous les pouvoirs du souverain[171]. Face à la nécessité d'affirmer ces pouvoirs, le Parlement a eu tendance à instaurer un système global, dont le pouvoir de perquisition constitue une partie intégrante, bien qu'accessoire[172]. Les modes d'application de la loi, en général, et les pouvoirs de perquisition et de saisie, en particulier, commencèrent à se multiplier, au fur et à mesure que le Parlement se penchait sur un nombre croissant de problèmes sociaux.

132. Pour le droit criminel, la terrible vague de crimes urbains au dix-huitième siècle créa un besoin urgent de mesures législatives. En 1718, on se plaignait que Londres fût devenu [TRADUCTION] «un repaire de voleurs, un lieu où se retrouvaient toutes sortes de personnes et d'usages infâmes[173]». Cette vague de crimes persista durant un siècle et demi. Le Parlement anglais réagit par une multiplication de dispositions législatives intéressantes pour nous parce qu'introduisant une première génération de mandats créés par une loi en droit criminel: elles visaient essentiellement le vol, la contrefaçon, le vagabondage, les maisons de jeu et de désordre, les explosifs et les armes à feu ainsi que le recel. Comme nous le verrons plus loin, un grand nombre de ces dispositions seront reprises par la législation coloniale. À la veille de la Confédération, les provinces du Canada possédaient un amalgame de pouvoirs de perquisition et de saisie aussi divers, pour la plus grande partie, que ceux de l'Angleterre[174]. C'est seulement après l'apogée du mouvement de réforme en Grande-Bretagne avec les projets de rédaction de la "Criminal Code Bill Commission" en 1880, que le Canada entreprendra une étape importante: la mise en vigueur de son propre *Code criminel* refondu de 1892.

133. En matière de pouvoirs de perquisition et de saisie, cette codification introduit des dispositions générales qui deviendront l'actuel article 443 du *Code criminel*. Ces dispositions relatives au mandat ne portent pas seulement sur des biens reliés à des infractions criminelles, mais élargissent la catégorie des choses saisissables de façon à viser aussi la preuve d'une infraction et les objets pouvant être utilisés pour fins d'agression. La codification de 1892 ne refond donc pas toutes les dispositions relatives au mandat en une seule mais laisse subsister un grand nombre de mandats spéciaux. D'autres mandats spéciaux seront créés par la suite pour faire face aux problèmes des stupéfiants et des drogues et à la distribution de

publications obscènes. L'adoption de cette disposition de portée pratiquement universelle a cependant pour effet de créer un principe global permettant d'autoriser des perquisitions reliées à des crimes au moment et à l'endroit où la chose est nécessaire. L'expérience faite par les Canadiens en 1893 est donc profondément différente de celle des Britanniques. Ceux-ci ont continué à confiner les dispositions relatives aux mandats à des lois ponctuelles[175].

134. Le mandat de l'article 443 est donc sur le plan historique, d'origine récente. Il constitue toutefois grâce à son caractère global un point de départ logique pour une présentation systématique des dispositions législatives actuelles.

A. L'article 443 et les autres dispositions générales

135. Voici le libellé du paragraphe 443(1) du *Code*:

> Un juge de paix qui est convaincu à la suite d'une dénonciation faite sous serment suivant la formule 1, qu'il existe un motif raisonnable pour croire que, dans un bâtiment, contenant ou lieu se trouve
>
> *a)* une chose sur ou concernant laquelle une infraction à la présente loi a été commise ou est soupçonnée avoir été commise,
>
> *b)* une chose qui, pour un motif raisonnable, porte à croire qu'elle fournira une preuve touchant la perpétration d'une infraction à la présente loi, ou
>
> *c)* une chose qui, pour un motif raisonnable, porte à croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat,
>
> peut, à tout moment, lancer un mandat sous son seing, autorisant une personne y nommée ou un agent de la paix à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose, la saisir et la transporter devant le juge de paix qui a décerné le mandat, ou quelque autre juge de paix de la même circonscription territoriale, afin qu'il en dispose d'après la loi.

136. Nous avons déjà mentionné l'origine de cette disposition[176]. Depuis son introduction, elle est devenue, par interprétation judiciaire, le symbole même des caractères judiciaire et de spécificité reconnus comme essentiels au mandat. Le «caractère judiciaire» réside principalement dans le «motif raisonnable pour croire» qui doit être contenu dans la dénonciation. Les cours ont en effet affirmé que le juge de paix exerçait une fonction «judiciaire»

lorsqu'il verifiait l'existence de ces motifs[177]. Le critère de spécificité se rattache aux éléments de procédure: la chose qui est recherchée, l'infraction qu'elle concerne, le «bâtiment, le contenu ou le lieu» où l'on veut perquisitionner. La jurisprudence a cerné avec plus de détail le degré de spécificité de ces éléments, degré qui n'est formulé que de façon implicite dans l'article lui-même. La liste des choses recherchées, par exemple, doit être établie de façon telle que les agents de la paix qui exécutent le mandat n'aient aucun pouvoir discrétionnaire à l'égard de ce qui doit être saisi[178].

137. La principale autorité pour l'exécution de la perquisition reste le mandat lui-même. Il convient toutefois de mentionner certaines autres règles pertinentes. Comme l'indique le paragraphe 443(1), le mandat peut être exécuté soit par un agent de la paix, soit par une autre «personne y nommée». Le texte vise donc le citoyen ordinaire et représente un élargissement de la règle de common law selon laquelle le juge était obligé de délivrer des mandats à un policier, même si des plaignants privés pouvaient l'accompagner pour l'aider à identifier les biens volés. La jurisprudence a toutefois restreint la possibilité pour le citoyen ordinaire d'utiliser les pouvoirs d'exécution, en lui interdisant d'exécuter un mandat délivré à la suite de sa propre dénonciation[179].

138. Aux termes de l'article 444, le mandat «doit être exécuté de jour, à moins que le juge de paix, par le mandat, n'en autorise l'exécution de nuit». Cette disposition représente en fait une modification de la règle de common law qui interdisait les fouilles de nuit, à la fois à cause de leur «caractère perturbateur» et à cause de la crainte que des cambriolages puissent être camouflés en perquisition avec mandat[180]. La préférence pour la perquisition de jour demeure. D'autre part, la loi ne stipule aucun délai d'exécution de la perquisition. Certaines décisions permettent de penser cependant que le juge qui délivre le mandat a le pouvoir de limiter le délai de son exécution[181].

139. Finalement, en ce qui concerne les objets qui peuvent être saisis, l'article 445 précise ce qui suit:

> Quiconque exécute un mandat décerné en vertu de l'article 443 peut saisir, outre ce qui est mentionné dans le mandat, toute chose qu'il croit, pour des motifs raisonnables, avoir été obtenue au moyen d'une infraction ou avoir été employée à la perpétration d'une infraction, et peut la transporter devant le juge de paix qui a décerné le mandat ou quelque autre juge de paix pour la même circonscription territoriale, afin qu'il en soit disposé conformément à l'article 446.

Il s'agit là d'une caractéristique propre au mandat émis en vertu de l'article 443. Elle fut introduite dans le *Code criminel* lors de la refonte de 1953-54, malgré l'inquiétude de certains membres du Comité parlementaire qui trouvaient qu'elle violait le principe de spécificité inhérent au mandat, au nom d'un but «logique», celui d'éviter la multiplication des procédures de délivrance[182]. Outre cette disposition générale autorisant la saisie de choses additionnelles, l'exécution d'un mandat délivré en vertu de l'article 443 permet, par le jeu de l'article 447, la saisie et la disposition de substances explosives destinées à servir à une fin illégale.

140. On s'est demandé souvent si les dispositions de l'article 443 s'appliquent à d'autres lois que le *Code criminel*. Il est clair qu'elles ne s'appliquent pas, sauf disposition contraire, aux infractions créées par une loi provinciale[183]. S'appliquent-elles toutefois aux autres lois fédérales par le jeu du paragraphe 27(2) de la *Loi d'interprétation*[184]? Il est possible logiquement de soutenir que l'article 443 ne s'applique qu'au *Code* lui-même. Toutefois le point de vue prédominant à l'heure actuelle est que l'article 443 peut être utilisé pour l'application d'une autre loi, à moins que cette dernière ne l'interdise expressément ou implicitement[185]. L'importance de cette question dans le cadre de la présente étude réside dans son effet sur les perquisitions relatives aux drogues et aux stupéfiants. Dans *Re Goodbaum and The Queen*, la cour a décidé que les dispositions de l'article 443 sont exclues d'une manière implicite étant donné que la *Loi sur les stupéfiants* contient ses propres règles de perquisition, de saisie et de confiscation[186]. En conséquence, ces règles particulières discutées ci-après ne sont pas, contrairement aux autres mandats spéciaux, des solutions de rechange à la procédure prévue à l'article 443. Leur existence a plutôt, au moins sur le plan théorique, empêché le recours à l'article 443 dans le cas de la perpétration d'infractions relatives aux stupéfiants et aux drogues.

B. Les dispositions relatives aux maisons de jeu et aux maisons de prostitution

(1) *Le paragraphe 181(1)*

141. Le paragraphe 181(1) du *Code criminel* énonce:

> Un juge de paix qui reçoit d'un agent de la paix un rapport écrit déclarant qu'il a des motifs raisonnables de croire et qu'il croit

> réellement qu'une infraction visée par l'article 185, 186, 187, 189, 190 ou 193 se commet à quelque endroit situé dans le ressort du juge de paix peut émettre un mandat sous sa signature, autorisant un agent de la paix à entrer et perquisitionner dans cet endroit, de jour ou de nuit, ou à saisir toute chose y trouvée qui peut constituer une preuve qu'une infraction aux termes de l'article 185, 186, 187, 189, 190 ou 193, selon le cas, se commet à cet endroit, et à mettre sous garde toutes les personnes trouvées dans cet endroit, et requérant que ces personnes soient conduites et ces choses apportées devant lui ou un autre juge de paix ayant juridiction, afin qu'elles soient traitées selon la loi.

Les infractions visées par ce texte ont trait à l'utilisation d'un endroit pour des fins de maison de jeu ou pari (article 185), à la gageure et au bookmaking (article 186), au fait de placer des paris pour quelqu'un d'autre (article 187), aux loteries et jeux de hasard (articles 189 et 190) et à la tenue d'une maison de débauche (article 193). Les choses saisies en vertu de ce paragraphe peuvent être déclarées confisquées aux termes du paragraphe 181(3) après un délai de trente jours, ou lorsqu'elles ne sont plus nécessaires à titre de preuve.

142. L'origine de ce mandat peut être retracée dans plusieurs mesures concernant «le pauvre en état de vagabondage» qui furent instituées au milieu du dix-huitième siècle. Elles visaient à contrôler certaines activités que l'on croyait propres à inspirer des tendances criminelles. Comme le souligne Leon Radzinowicz dans son ouvrage *A History of English Criminal Law*, [TRADUCTION] «[d]'une façon plutôt mal définie, l'oisiveté, l'ivrognerie et l'immoralité en vinrent à être considérées comme les causes immédiates de la criminalité et comme une menace directe à la stabilité sociale[187]». Ces mandats de perquisition devaient donc permettre l'application de dispositions qui, selon la perception qu'on en avait, ne définissaient pas des activités criminelles sérieuses mais constituaient plutôt des mesures préventives contre le crime. L'évolution de la législation à partir de ces anciens mandats jusqu'à l'actuel article 181 est fort complexe. Elle enseigne cependant comment cette histoire déroutante a pu donner naissance à deux des principales caractéristiques des mandats actuels: le pouvoir de se saisir de personnes trouvées dans les lieux perquisitionnés, et l'utilisation du «rapport écrit».

143. La possibilité de se saisir de personnes constituait la caractéristique principale des premiers mandats de ce genre. Des lois fort mal rédigées de 1744 et de 1752, faisaient allusion à de vastes pouvoirs de perquisition avec mandat visant les «vagabonds», les turbulents et les oisifs[188]. Il s'agissait là essentiellement de mandats d'arrestation. Les personnes arrêtées au cours d'une perquisition étaient amenées devant des juges de paix et interrogées sur leurs

moyens de subsistance. La législation de 1752 créait aussi des mandats d'arrestation s'appliquant aux tenanciers de maisons de débauche et de jeu. L'association entre les personnes oisives et turbulentes et ces établissements fut éventuellement reprise au Canada et incorporée dans la législation après la Confédération[189]. Avec le temps, les mesures législatives ont été élargies pour prévoir la saisie du matériel de jeu et des éléments de preuve des infractions pertinentes[190].

144. La coexistence du pouvoir d'arrestation et de perquisition dans une même disposition peut sembler curieuse. La véritable anomalie de cette disposition réside cependant dans le fait que la détention de personnes ne constitue plus uniquement une simple garde à vue. Un ajout de 1854 à la loi anglaise sur le jeu permettait en effet au juge de paix de soumettre ceux qui avaient été trouvés sur les lieux à un interrogatoire obligatoire et sous serment. C'était donner à la saisie un caractère d'enquête[191]. Ce caractère subsiste dans l'actuel article 183, qui énonce notamment ce qui suit:

> (1) Un juge de paix devant qui une personne est conduite aux termes d'un mandat émis en vertu de l'article 181 ... peut exiger que la personne soit interrogée sous serment et qu'elle témoigne concernant
>
> *a*) la fin pour laquelle l'endroit mentionné dans le mandat est ou a été utilisé, tenu ou occupé, et
>
> *b*) toute matière relative à l'exécution du mandat[192].

145. La procédure du «rapport écrit» a aussi son origine dans la législation anglaise sur la police de 1839. La disposition initiale était extrêmement complexe, et reflétait les tensions existant entre les forces de police métropolitaines récemment créées et les juges de paix. Dans la nouvelle structure, la demande d'autorisation entrait désormais dans les attributions des forces policières. Après avoir reçu un rapport du surintendant sur l'existence d'une maison de jeu, les commissaires de police avaient le pouvoir de délivrer une ordonnance écrite autorisant une perquisition des lieux. Un certain pouvoir officiel était cependant concédé aux juges de paix. Étaient annexées au rapport, des plaintes faites sous serment par les citoyens présentant la dénonciation devant un magistrat local ordinaire[193].

146. Ce rôle purement officiel du juge de paix semble être une dérogation manifeste au «caractère judiciaire» de la procédure du mandat. Il faut remarquer toutefois que cette procédure ne portait, à l'époque, sur aucun mandat au vrai sens du mot. Il s'agissait plutôt essentiellement d'une communication à deux sens dans la chaîne hiérarchique de la police: le «rapport» au supérieur, «l'ordre» aux

subalternes. Le mot «mandat» ne fut inscrit dans l'article que longtemps après son adoption au Canada, puisqu'il apparaît pour la première fois dans la refonte du *Code criminel* de 1953-54. Dans l'intervalle, le juge de paix joue un rôle décisionnel dans le processus, et ne se contente plus de faire prêter serment. Le serment du citoyen n'est plus exigé en Angleterre depuis 1845, c'est-à-dire avant que le système ne soit introduit de ce côté de l'Atlantique[194]. Avec la fin de l'intervention de la hiérarchie policière dans la procédure d'autorisation, la transformation est pratiquement totale. La loi ne sanctionne qu'une simple relation entre l'agent de la paix, qui fait la demande, et le juge de paix, qui délivre le mandat. La seule modification nécessaire pour rendre cette pratique conforme au modèle d'un véritable mandat aurait été de substituer une dénonciation au «rapport». Pourtant cette modification n'a jamais été apportée[195].

147. Celui qui demande la délivrance d'un mandat en vertu de l'article 181 doit seulement déclarer dans le rapport qu'il «a des motifs raisonnables de croire et qu'il croit réellement ...» à l'existence des faits sans avoir à préciser quels sont ces motifs raisonnables. En Angleterre, avec les premières révisions, l'obligation d'affirmer les faits dans la demande a disparu en même temps que la plainte du citoyen faite sous serment. La jurisprudence a cependant tenté de remédier d'une certaine façon à ces omissions. Dans l'affaire *Regina* v. *Foster*; *Ex parte Royal Canadian Legion Branch 177*, il a été décidé que le juge de paix, pour exercer correctement son pouvoir judiciaire discrétionnaire, doit se demander sur quoi se fonde la croyance de l'auteur du rapport que certains motifs militent en faveur de la délivrance du mandat[196].

(2) *Le paragraphe 181(2)*

148. Le paragraphe 181(2) du *Code criminel* énonce:

> Qu'il agisse ou non en vertu d'un mandat émis par l'application du présent article, un agent de la paix peut mettre sous garde une personne qu'il trouve tenant une maison de jeu et toute personne qu'il y découvre, et saisir toute chose susceptible de constituer une preuve qu'une telle infraction se commet, et il doit conduire ces personnes et apporter ces choses devant un juge de paix ayant juridiction, afin qu'elles soient traitées selon la loi.

Les dispositions du paragraphe 181(3) sur la confiscation s'appliquent aussi bien à ce paragraphe qu'au paragraphe 181(1).

149. Le paragraphe 181(2) s'applique, que l'agent de la paix «agisse ou non en vertu d'un mandat». Les pouvoirs conférés par cette disposition ajoutent toutefois peu de choses au mandat. Ne conférant aucun pouvoir exprès de «fouille», le paragraphe 181(2) ne peut être considéré comme autorisant l'entrée sans mandat dans des lieux suspects; il donne simplement un certain pouvoir discrétionnaire aux agents se trouvant déjà sur les lieux, que ce soit en vertu d'un mandat ou par suite d'une invitation. Les modalités de ce pouvoir discrétionnaire correspondent dans une large mesure aux dispositions du paragraphe 181(1). Le pouvoir spécifique de mettre sous garde les personnes trouvées «tenant une maison de débauche» conféré par le paragraphe (2) ne signifie pas grand chose; comme, de toute façon, on peut s'attendre que le tenancier se trouve sur les lieux, il serait possible de le mettre sous garde aux termes du paragraphe 181(1) à titre de personne trouvée sur les lieux. Et comme la saisie de «preuves» en vertu du paragraphe 181(2) ne se limite pas expressément aux objets trouvés sur les lieux, la jurisprudence a donné une portée plus étroite à cette distinction. Selon la décision rendue dans l'affaire *Chew*, le paragraphe 181(1) ne permet que la saisie d'objets susceptibles de constituer une preuve de l'infraction commise à ce moment même:

> [TRADUCTION]
> D'après moi, ce paragraphe vise manifestement les cas où une descente est effectuée dans une maison de jeu; il permet à la police, dans une telle situation, d'arrêter les tenanciers et les personnes trouvées sur les lieux et de saisir, avec ou sans mandat de perquisition, toute chose susceptible d'établir la perpétration d'une infraction pertinente au moment même de l'arrestation et de la saisie[197].

(3) *Les femmes dans des maisons de débauche*

150. Voici le texte du paragraphe 182(1) du *Code criminel*[198]:

> Un juge de paix convaincu, par dénonciation sous serment, qu'il existe un motif raisonnable pour croire qu'une personne de sexe féminin a été entraînée ou est cachée dans une maison de débauche, peut décerner sous son seing un mandat autorisant un agent de la paix, ou une autre personne y nommée, à entrer et perquisitionner dans cet endroit, de jour ou de nuit, et requérant que cette personne et le tenancier de l'endroit soient amenés devant lui ou un autre juge de paix ayant juridiction, afin d'être mis sous garde ou libérés, selon qu'il le juge opportun.

151. Cette disposition remonte à la législation anglaise de 1885 sur les infractions sexuelles. Les prostituées pouvaient depuis

longtemps être arrêtées en vertu des lois sur le vagabondage. Toutefois, la législation relative au mandat présentait manifestement un caractère plus protecteur que condamnatoire. La loi répondait à l'inquiétude grandissante, apparue à la fin du dix-neuvième siècle, au sujet de l'exploitation sexuelle de jeunes filles, et en particulier de celles des classes inférieures qui étaient vendues comme prostituées par des membres de leur famille ayant besoin d'argent. Le législateur, après avoir adopté de nouvelles lois interdisant l'exploitation des jeunes filles et réprimant la détention des femmes à des fins immorales, trouva dans le mandat un moyen de favoriser ces fins[199]. Après une série de dispositions législatives adoptées au cours des cinquante années suivantes, le mandat finit par trouver sa place en droit canadien[200].

152. La procédure établie en vertu de cet article semble de façon générale suivre le modèle traditionnel. Elle comporte une dénonciation sous serment qui doit présenter des motifs raisonnables, et donne au juge de paix un pouvoir décisionnel. Le mandat, comme celui de l'article 443, peut être exécuté par une personne autre qu'un agent de la paix. Il en diffère cependant par le fait qu'il peut être exécuté «de jour ou de nuit». L'aspect le plus remarquable de ce mandat réside cependant dans le fait qu'aux termes de l'article 183, tout comme les personnes trouvées sur les lieux, et en fait comme leurs propres «gardiens», les femmes délivrées peuvent elles aussi être soumises à un interrogatoire obligatoire de la part du juge de paix. Cette caractéristique, ainsi que le pouvoir du juge de paix de mettre la femme sous garde ou de la libérer «selon qu'il le juge opportun» laisse transparaître que derrière une apparence d'opération de sauvetage se profile en fait une véritable arrestation[201].

C. Les stupéfiants et les drogues

153. L'article 10 de la *Loi sur les stupéfiants*[202] énonce notamment:

> (1) Un agent de la paix peut, à toute époque,
>
> *a)* sans mandat, entrer et perquisitionner dans tout endroit autre qu'une maison d'habitation, et, sous l'autorité d'un mandat de main-forte ou d'un mandat délivré aux termes du présent article, entrer et perquisitionner dans toute maison d'habitation où il croit, en se fondant sur des motifs raisonnables, qu'il se trouve un

stupéfiant au moyen duquel ou à l'égard duquel une infraction à la présente loi a été commise;

b) fouiller toute personne trouvée dans un semblable endroit; et

c) saisir et enlever tout stupéfiant découvert dans un tel endroit, toute chose qui s'y trouve et dans laquelle il soupçonne en se fondant sur des motifs raisonnables qu'un stupéfiant est contenu ou caché, ou tout autre chose au moyen ou à l'égard de laquelle il croit en se fondant sur des motifs raisonnables qu'une infraction à la présente loi a été commise, ou qui peut constituer une preuve établissant qu'une semblable infraction a été commise.

(2) Un juge de paix convaincu, d'après une dénonciation faite sous serment, qu'il existe des motifs raisonnables de croire qu'un stupéfiant au moyen ou à l'égard duquel une infraction à la présente loi a été commise se trouve dans une maison d'habitation quelconque, peut délivrer un mandat portant sa signature et autorisant un agent de la paix y nommé à entrer à toute heure dans la maison d'habitation pour découvrir des stupéfiants.

(3) Un juge de la Cour de l'Échiquier du Canada doit, à la demande du Ministre, délivrer un mandat de main-forte autorisant et habilitant la personne qui y est nommée, aidée et assistée de tel individu que la personne y nommée peut requérir, à entrer à toute heure dans une maison d'habitation quelconque pour découvrir des stupéfiants.

154. Les paragraphes 37(1) à (3) de la *Loi des aliments et drogues* contiennent des dispositions semblables en matière de perquisitions et saisies visant des drogues «contrôlées». Les règles établies en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* comportent une différence: en vertu de l'alinéa 1*c*) de cette dernière, un agent de la paix n'a le pouvoir de saisir que «toute drogue contrôlée trouvée dans un semblable endroit ainsi que toute autre chose qui peut prouver qu'une infraction» relative aux drogues contrôlées a été commise; mais vu la grande portée de l'expression «chose qui peut prouver», il ne faut sans doute pas attacher beaucoup d'importance à l'omission des contenants ou objets «au moyen ou à l'égard desquels» une infraction à la *Loi des aliments et drogues* a été commise. Enfin, en vertu de l'article 45 de la *Loi des aliments et drogues*, l'article 37 s'applique, avec les adaptations nécessaires, aux cas relatifs à des drogues «d'usage restreint». On peut donc en conclure que les perquisitions et les saisies visant des stupéfiants, des drogues contrôlées et des drogues d'usage restreint sont régies par des dispositions législatives pratiquement identiques sauf pour ce qui a trait à la désignation des substances.

155. Deux observations importantes ressortent à la lecture de ces dispositions. En premier lieu, dans le cas d'une perquisition de

maison d'habitation, le mandat ne constitue qu'une possibilité venant s'ajouter à celle déjà offerte du mandat de main-forte. En deuxième lieu, aucune permission écrite n'est nécessaire lorsque l'endroit où il doit y avoir perquisition n'est pas une maison d'habitation.

156. La fréquence croissante de l'utilisation de moyens autres que le mandat est le signe d'une tendance historique qui traduisait l'inquiétude grandissante du gouvernement. Cette inquiétude prit naissance par la découverte, au début du siècle, de l'usage que faisaient de l'opium les immigrants asiatiques de Colombie-Britannique. Ce phénomène entraîne, au cours des années suivantes, une croisade contre les stupéfiants qui, comme l'a expliqué en détail MacFarlane dans son étude sur la législation relative aux drogues[203], se déroulait dans un climat de sensationnalisme entretenu par les politiciens et par la presse. Certains comptes rendus sur les conséquences de l'utilisation de la marijuana étaient fréquents dans les années 1920, ainsi:

> [TRADUCTION]
> Les personnes s'adonnant à cette drogue sont immunisées contre la douleur, lorsqu'elles sont sous son influence, et elles pourraient être gravement blessées sans pouvoir réaliser leur état. Lorsqu'elles sont sous l'effet de la drogue, elles deviennent des maniaques en proie à des hallucinations. Elles sont capables alors de tuer ou de se livrer à de la violence sur d'autres personnes, en utilisant les méthodes de cruauté les plus sauvages tout en ne gardant, comme nous l'avons dit auparavant, aucun sens de responsabilité morale[204].

Trente ans plus tard, le langage tenu était pratiquement le même. Le futur Premier ministre John Diefenbaker avait taxé le trafic de stupéfiants de «meutre par étapes»[205].

157. Il n'est par conséquent pas étonnant de constater une augmentation de la rigueur des pouvoirs en matière de stupéfiants et de drogues. En 1911, le magistrat avait le pouvoir de délivrer un mandat de perquisition pour drogues illégales[206]. En 1923, des agents de la paix avaient déjà acquis le droit de perquisitionner sans mandat dans des endroits autres que des maisons d'habitation[207]. La primauté du mandat se trouve finalement presque anéantie en matière de stupéfiants, lorsqu'en 1929 le Parlement décide de permettre le recours au mandat de main-forte pour faire respecter la loi[208]. Des dispositions similaires devaient couvrir le cas des drogues illégales en 1961[209].

158. La délivrance de mandats en vertu des dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* a été considérée comme l'exercice d'une fonction judiciaire, tout comme

dans le cas de l'article 443. Ainsi, les tribunaux ont posé des exigences particulières relevant du critère de spécificité, en insistant pour que la nature des substances interdites soit indiquée clairement, et pour qu'un seul texte législatif soit invoqué dans chaque cas[210]. Mais ces critères judiciaires rigoureux s'opposent à plusieurs autres pouvoirs discrétionnaires associés à la *Loi sur les stupéfiants* et la *Loi des aliments et drogues* en ce qui touche aussi bien les perquisitions avec mandat et sans mandat que les perquisitions avec mandat de main-forte. Par exemple, les paragraphes 10(4) et 37(4), respectivement, donnent aux agents qui exécutent des perquisitions en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* un pouvoir discrétionnaire spécial et pratiquement illimité de forcer les contenants ou autres obstacles à la fouille.

159. Ce qui étonne, dans la structure des pouvoirs conférés par ces dispositions, c'est le manque d'uniformité des critères régissant les divers types de perquisitions et de saisies. Le droit d'entrer dans une maison d'habitation et d'y perquisitionner dépend de la croyance qu'une substance interdite, et non simplement la preuve d'une infraction pertinente, se trouve dans les lieux; cependant, après y être entré, l'agent de la paix peut saisir toute une gamme d'objets, y compris des choses qui n'ont qu'une valeur probante. La situation est encore plus complexe dans le cas des perquisitions sans mandat.

160. Cette complexité provient de la structure grammaticale de l'alinéa 10(1)*a*) de la *Loi sur les stupéfiants*, reproduite à l'alinéa 37(1)*a*) de la *Loi des aliments et drogues*. En effet, les mots «où il croit, en se fondant sur des motifs raisonnables, qu'il se trouve un stupéfiant ...» étant insérés après le passage relatif aux perquisitions avec mandat ou mandat de main-forte, on pourrait croire que la perquisition sans mandat dans un endroit autre qu'une maison d'habitation n'a pas à être appuyée par des motifs raisonnables, ni, à cet égard, la fouille de «toute personne trouvée dans un semblable endroit» autorisée par les alinéas 10(1)*b*) et 37(1)*b*). Mais cette interprétation a été rejetée dans la jurisprudence des tribunaux inférieurs; ces derniers se sont montrés réticents à reconnaître l'existence de pouvoirs policiers aussi vastes sans une disposition légale claire à cet effet. Dans l'affaire *Jaagusta*, par exemple, la Cour provinciale de la Colombie-Britannique a nié la validité d'une fouille pratiquée sur un individu après qu'on lui eut demandé d'arrêter son véhicule[211]. Dans sa décision, le juge de district Goulet a refusé d'adopter l'interprétation large selon laquelle une telle fouille pouvait être faite de façon discrétionnaire. Pour le juge, cette interprétation [TRADUCTION] «aurait pour effet de légaliser les fouilles personnelles

les plus abusives et les plus arbitraires[212]». Mais l'application de cette décision, de même que d'autres de même nature[213], semble limitée aux cas où la personne fouillée ne se trouve pas dans un lieu où l'on croit, pour des motifs raisonnables, qu'il y a des stupéfiants ou des drogues. Car dans ce dernier cas, le lieu ainsi que toutes les personnes qui s'y trouvent peuvent faire l'objet de la fouille. De même, lorsqu'une perquisition dans un lieu est autorisée par mandat ou par mandat de main-forte, la loi ne semble comporter aucune restriction quant à la fouille des personnes qui s'y trouvent.

D. Les publications obscènes, les histoires illustrées de crime et la propagande haineuse

161. Le paragraphe 160(1) du *Code criminel* énonce que:

> Un juge convaincu, par une dénonciation sous serment, qu'il existe des motifs raisonnables de croire qu'une publication dont des exemplaires sont tenus, aux fins de vente ou distribution, dans un local du ressort de la Cour, est obscène ou est une histoire illustrée de crimes, doit émettre, sous son seing, un mandat autorisant la saisie des exemplaires.

Pour sa part, le paragraphe 282.3(1) du *Code* est à l'effet suivant:

> Un juge convaincu, par une dénonciation sous serment, qu'il existe des motifs raisonnables de croire qu'une publication, dont des exemplaires sont gardés aux fins de vente ou de distribution dans un local du ressort du tribunal, est de la propagande haineuse, doit émettre, sous son seing, un mandat autorisant la saisie des exemplaires.

Dans ces deux cas, l'occupant du local reçoit après la saisie une sommation l'obligeant à présenter les raisons pour lesquelles les objets saisis ne devraient pas être confisqués au profit de la Couronne. Cette audition ne vise pas tant à établir la culpabilité du possesseur qu'à déterminer si les documents saisis sont bien des publications obscènes, des histoires illustrées de crime ou de la propagande haineuse, selon le cas. C'est pourquoi ces dispositions sont souvent décrites comme des procédures *in rem*.

162. La dérogation importante qu'apportent ces textes à l'article 443 réside dans le fait qu'ils autorisent la saisie de *tout* le matériel jugé offensant, et pas seulement d'échantillons susceptibles d'être présentés en preuve. Cette distinction a été clairement établie dans l'affaire *Nimbus News and Distributors Ltd.*[214], dans laquelle le

tribunal avait autorisé la Couronne à ne retenir que quatre exemplaires de chacune des publications présumées obscènes saisies en vertu de la disposition correspondant à l'article 443 actuel. La Couronne n'aurait pas été soumise à ces restrictions s'il s'était agi d'un mandat délivré en vertu de l'article 160. Le mandat a donc un caractère préventif. Il vise à empêcher la diffusion du matériel dans le public tant que sa légalité n'a pas été décidée. Ce caractère préventif de la procédure répond à deux objectifs: garder les publications hors de la portée du public et, dans le cas particulier des publications obscènes, restreindre les profits du distributeur[215].

163. Le caractère préventif du mandat de l'article 160 constitue d'ailleurs un avantage souligné par E. Davie Fulton, ministre de la Justice de l'époque, lors d'une présentation à la Chambre des communes en 1959[216]. On prétendait en outre à l'époque que le nouveau mandat offrait une procédure d'exécution [TRADUCTION] «rapide, juste et objective», et allait supprimer les délais consécutifs à une saisie ordinaire et la nécessité d'attendre jusqu'au procès pour obtenir une décision. Il existait cependant un quiproquo: l'absence d'inculpation. Comme le soulignait Fulton,

> [Par cet amendement] nous n'apportons rien de neuf, sauf que nous permettons de régler le cas sans qu'il soit nécessaire d'inculper la personne en cause[217].

En fait, aux termes du paragraphe 160(7), aucune inculpation ne peut être portée sans l'autorisation du procureur général, à l'égard des publications confisquées ainsi.

164. Le mandat de l'article 160 a été ajouté au *Code* en 1959. Deux facteurs expliquaient son adoption à ce moment précis. Tout d'abord, c'est durant les années 1950 que la question de l'obscénité suscita un intérêt considérable en Grande-Bretagne. Cet intérêt atteignit son point culminant avec le *Obscene Publications Act, 1959*, loi comprenant une procédure *in rem* virtuellement identique à celle que l'on trouve dans le droit canadien[218]. Ensuite, les discours du ministre de la Justice de l'époque montrent que les officiers de justice au Canada estimaient que les lois existantes étaient désuètes[219].

165. La création du mandat de l'article 281.3, onze années plus tard, tenait aussi au fait que les lois existantes étaient jugées inadéquates pour répondre efficacement à la crise sociale. Le Comité spécial de la propagande haineuse au Canada, créé en 1965, avait souligné qu'«on n'a cessé de faire de la propagande néo-nazie, surtout contre les Juifs et les Noirs[220]». À la suite des recommandations de ce comité, de nouvelles infractions furent

créées, qui interdisaient de prôner le génocide et d'inciter publiquement à la haine contre des groupes particuliers. Le comité recommandait aussi d'«étudier la question de la saisie de matières relatives à la propagande haineuse et de leur confiscation après déclaration de culpabilité[221]». Plutôt que de subordonner la confiscation à une déclaration de culpabilité, le législateur a cependant opté en faveur d'une procédure *in rem*, virtuellement identique à celle de l'article 160 sauf sur deux points. En premier lieu, en vertu du paragraphe 281.3(7), le consentement du procureur général est nécessaire pour initier la procédure relative au mandat. En second lieu, ce consentement, une fois la saisie faite, n'est plus nécessaire pour porter une accusation.

166. La procédure de délivrance des mandats prévue par ces textes offre une certaine ressemblance avec celle de l'article 443: une dénonciation est faite sous serment. Le même critère du «motif raisonnable de croire» est utilisé. Celui qui délivre le mandat n'est pas simplement un juge de paix, mais «un juge» d'une des cours d'archives de la province. De façon paradoxale, cependant, il semble qu'en dépit de son rang plus élevé, le juge, contrairement au juge de paix dans le cas d'autres procédures ayant trait à des mandats en droit criminel, n'a aucun pouvoir discrétionnaire sur la question. Une fois les conditions préalables remplies, le texte dit que le juge a l'obligation de délivrer le mandat.

E. Les armes

167. Les perquisitions et saisies en matière d'armes sont visées par les articles 99 à 101 du *Code criminel*. Essentiellement, ces dispositions portent sur un mandat de perquisition autorisant la saisie (le paragraphe 101(1)) et sur trois pouvoirs de perquisition et saisie sans mandat (les paragraphes 99(1), 100(1) et 101(2)).

168. L'orientation de la législation vers le système de perquisition sans mandat est récente. Les pouvoirs individuels de perquisition et de saisie relatifs à la poudre, aux armes et aux explosifs qui virent le jour après la Confédération étaient généralement exercés par la voie d'un mandat, ou dans le cadre d'une arrestation[222]. Lors de la codification de 1892, ces mandats se trouvèrent fondus dans les dispositions plus larges de l'article 443 actuel, même si certaines procédures spéciales furent effectivement conservées. La première fissure importante dans l'édifice apparaît en

1913, dans un ensemble de lois visant à combattre ce que C.J. Doherty, ministre de la Justice de l'époque, avait appelé «une forte augmentation dans le nombre de crimes violents[223]». Un agent de la paix avait le pouvoir de fouiller «toute personne qu'il a raison de croire et croit vraiment avoir sur sa personne quelque arme, invention ou dispositif prohibés». Le mandat est cependant demeuré le mécanisme général de perquisition, jusqu'à la révision de 1953-54, c'est-à-dire jusqu'à l'adoption de l'ancêtre de l'actuel article 99[224].

(1) *Le paragraphe 99(1)*

169. Voici le texte du paragraphe 99(1) du *Code criminel*:

> L'agent de la paix qui croit, pour des motifs raisonnables, que se commet ou a été commise une infraction aux dispositions de la présente loi ayant trait aux armes prohibées, armes à autorisation restreinte, armes à feu ou munitions, peut, sans mandat, fouiller toute personne ou véhicule, perquisitionner en tout lieu ou local autre qu'une maison d'habitation et saisir toute chose au moyen ou au sujet de laquelle il croit raisonnablement que l'infraction est ou a été commise.

La confiscation des armes et explosifs saisis en vertu de cette disposition a lieu lorsqu'un tribunal en arrive à la conclusion, aux termes de l'article 446.1[225], qu'ils étaient liés à la perpétration d'une infraction.

170. Le paragraphe 99(1), en dépit de son étendue par rapport à ses prédécesseurs, renferme d'importantes restrictions. Tout d'abord, cette disposition n'autorise pas la perquisition dans les maisons d'habitation. En second lieu, les pouvoirs de fouille qu'il confère sont restreints par certaines garanties de common law contre les atteintes injustifiées. Il n'autorise en particulier l'agent de la paix qu'à agir à la suite d'une infraction qu'il croit raisonnablement être commencée. Il n'a donc pas la même portée que les dispositions autorisant les fouilles sommaires à l'occasion d'un contrôle d'identité, qui permettent de fouiller, pour découvrir des armes, les personnes dont on croit qu'elles sont «sur le point de commettre» une infraction[226]. Une étude préparée en 1975 pour le Solliciteur général recommandait de donner une portée plus préventive à l'article 99 et d'autoriser à cet effet les perquisitions pour découvrir des armes à feu [TRADUCTION] «sur le point d'être employées de façon illégale[227]», mais cette modification n'a pas été insérée. C'est plutôt dans l'article 101 qu'ont été exprimés les aspects préventifs, comme nous le verrons en détail un peu plus loin.

(2) *Le paragraphe 100(1)*

171. Le paragraphe 100(1) du *Code criminel* énonce ce qui suit:

> Par dérogation à l'article 99, l'agent de la paix qui trouve
>
> *a*) une personne en possession d'une arme à autorisation restreinte qui est incapable de lui présenter sur-le-champ pour examen le certificat d'enregistrement ou le permis en vertu duquel elle peut légalement l'avoir en sa possession,
>
> *b*) une personne âgée de moins de seize ans en possession d'une arme à feu qui est incapable de lui présenter sur-le-champ pour examen le permis en vertu duquel elle peut légalement l'avoir en sa possession, ou
>
> *c*) une personne en possession d'une arme prohibée,
>
> peut saisir ces armes, à moins, dans les cas prévus aux alinéas *a*) ou *b*), que les dispositions de la présente Partie autorisent en l'espèce cette personne à avoir en sa possession lesdites armes à autorisation restreinte ou armes à feu.

Tout comme dans le cas du paragraphe 181(2), il s'agit manifestement ici d'un pouvoir de «saisie» n'autorisant pas l'entrée dans des lieux privés. Après la saisie, une arme peut être déclarée confisquée en vertu d'une ordonnance rendue par un magistrat aux termes du paragraphe 100(3).

172. Cette disposition a été introduite dans les années 1930; à cette époque, la législation en matière d'armes a commencé à avoir pour principal objet le trafic des armes à feu, et en particulier leur vente à des mineurs. S'inscrivant dans ce courant, la disposition antérieure au paragraphe 100(1) portait spécifiquement sur la saisie et la confiscation d'armes illégalement en possession de mineurs[228]. Par la suite, la complexité de la législation sur le contrôle des armes à feu s'est accrue et les dispositions autorisant la saisie et la confiscation en sont venues à s'appliquer également aux armes prohibées et aux armes à autorisation restreinte. Mais tout comme dans le cas du paragraphe 99(1), la saisie prévue par ces dispositions n'est autorisée que dans la mesure où les circonstances font croire à la perpétration d'une infraction relative aux armes à feu.

(3) *L'article 101*

173. Voici le texte des deux premiers paragraphes de l'article 101 du *Code criminel*:

> (1) Un magistrat, sur demande du procureur général ou de son représentant, peut délivrer un mandat de perquisition autorisant la

saisie des armes à feu ou autres armes offensives, munitions ou substances explosives, dont une personne a la possession, la garde ou le contrôle lorsqu'il est convaincu qu'il existe des motifs raisonnables de croire qu'il n'est pas souhaitable pour la sécurité de cette personne ou pour celle d'autrui, de les lui laisser.

(2) Un agent de la paix peut, sans mandat, perquisitionner et saisir les armes à feu ou autres armes offensives, munitions ou substances explosives dont une personne a la possession ou la garde lorsqu'il est convaincu qu'il existe des motifs raisonnables de croire qu'il n'est pas souhaitable pour la sécurité de cette personne, ni pour celle d'autrui, de les lui laisser et que le danger pour la sécurité de cette personne ou d'autrui est tel qu'il serait impraticable de procéder par voie de demande en vertu du paragraphe (1).

174. De toute évidence, le pouvoir de perquisition et saisie prévu à l'article 101 présente un caractère préventif. Ce sont des motifs de sécurité qui constituent la justification du recours à ce pouvoir, et non le fait de croire que la perpétration d'une infraction est en cours. À cet égard, les paragraphes 101(1) et (2) s'opposent à l'article 99 et au paragraphe 100(1). Dans une certaine mesure, ces dispositions sont considérées comme complémentaires:

> Deux [articles 99 et 100] de ces quatre dispositions portent sur des infractions réelles au Code et visent donc surtout à réduire et à décourager l'utilisation des armes à des fins criminelles. Les deux autres [paragraphes 101(1) et 101(2)] ont trait à des situations de danger *appréhendé* plutôt qu'à des activités criminelles en soi. Elles visent par conséquent davantage à réduire le nombre d'utilisateurs irresponsables, c'est-à-dire qu'elles sont de nature préventive[229].

Il s'agit là, bien sûr, d'un objectif parfaitement louable. Cependant, les paragraphes 101(1) et (2) constituent une dérogation aux pouvoirs de perquisition et saisie traditionnels en matière de droit criminel, sur laquelle on ne saurait trop insister. Car en vertu de ces paragraphes, il n'est même pas nécessaire de croire qu'une personne se trouve en possession d'une arme pour la fouiller; il suffit simplement de croire qu'elle ne *devrait pas* posséder d'arme.

175. L'article 101, adopté sous sa forme actuelle en 1977, tire son origine d'une loi sur le contrôle des armes à feu présentée neuf ans auparavant et qui instituait un mandat autorisant la «saisie» d'armes à feu pour des motifs de sécurité[230]. John Turner, ministre de la Justice de l'époque, avait alors décrit l'objectif de cette disposition en des termes très restrictifs: elle visait à répondre à la menace que représente la possession d'armes et d'explosifs par des personnes qui ne sont pas saines d'esprit[231]. Cette disposition instituant un mandat comportait cependant certaines limites. Comme l'a reconnu l'affaire

Colet, elle n'autorisait pas les *perquisitions* et les *entrées* effectuées dans le but de réaliser une saisie de ce type[232]. Il semble que la connaissance de la présence d'une arme sur les lieux était nécessaire pour justifier une entrée ou une perquisition. En outre, l'obtention d'un mandat étant indispensable, cette disposition était inapplicable dans une situation qui préoccupe tout particulièrement la police: les querelles de ménage ou les querelles entre voisins lorsque les personnes ont accès à des armes[233]. C'est pour cette raison qu'en 1977, cette disposition fut élargie pour comprendre un pouvoir exprès de perquisition et la possibilité de procéder à une saisie sans mandat, pour répondre aux situations urgentes provoquées par ce type de querelles.

176. L'article 101, dans son libellé actuel, semble bien comporter deux aspects distincts. Le premier concerne l'application de la loi au sens le plus immédiat; il vise à désamorcer une situation dangereuse, en enlevant à la personne concernée une arme qu'elle pourrait être amenée à utiliser pour commettre un crime. Le second a trait à la réglementation. Cet objectif à plus long terme qui caractérise la loi de 1968, vise à s'assurer que des armes ne se trouvent pas en possession de personnes qui ne devraient pas en avoir. Cette préoccupation est apparente dans les dispositions sur les perquisitions et les saisies. Elle est aussi révélée par le caractère *in rem* de cet article qui sous plusieurs aspects reprend les procédures prévues aux articles 160 et 281.3. Lors de l'audition demandée par la Couronne en vertu du paragraphe 101(4), un magistrat a le pouvoir de déterminer si, pour des motifs de sécurité, la personne devrait avoir le droit de posséder des armes. S'il conclut par la négative, il peut aux termes du paragraphe 101(6) ordonner de disposer des objets saisis à des conditions justes et raisonnables, ou interdire à cette personne de posséder une arme pendant un période d'au plus cinq ans, ou les deux.

177. Les motifs présidant à la délivrance du mandat et aux procédures *in rem* de l'article 101 présentent donc des dérogations importantes aux critères habituels. Le paragraphe 101(1) offre aussi d'autres caractéristiques particulières. Il peut éventuellement permettre la fouille d'une personne[234]. Il n'est pas obtenu en présentant une dénonciation sous serment, mais «sur demande du procureur général ou de son représentant». Le serment, lors des procédures visant l'obtention du mandat, n'est pas nécessaire même si le texte précise que le magistrat doit entendre toute preuve pertinente lors de l'audition. Aucun délai n'est imposé pour l'exécution du mandat, mais l'alinéa 101(3)*a*) exige qu'un rapport

indiquant la date d'exécution soit remis au magistrat immédiatement après la saisie.

F. Les métaux précieux

178. Le paragraphe 353(1) du *Code criminel* est à l'effet suivant:

> Lorsqu'une dénonciation écrite est faite sous serment devant un juge de paix par une personne ayant un intérêt dans un claim minier, selon laquelle des métaux précieux ou de la roche, du minerai ou une autre substance renfermant de tels métaux sont illicitement déposés dans un endroit ou détenus par une personne contrairement à la loi, le juge de paix peut émettre un mandat ordonnant de perquisitionner en tout endroit ou de fouiller toute personne que mentionne la dénonciation.

Le paragraphe 353(2) confère au juge de paix le pouvoir de détenir, de rendre ou de confisquer les objets saisis en vertu du paragraphe (1) du dit article.

179. Ce mandat de perquisition constitue certainement une curiosité de notre procédure criminelle. Au premier abord, il semble viser le minerai volé. En fait il trouve son origine dans une disposition de la loi canadienne de 1869, l'*Acte concernant le Larcin*. Le contexte dans lequel s'insèrent ces dispositions de 1869, indique cependant un but plus particularisé: la mise en vigueur d'un programme administratif visant à empêcher le commerce illicite de l'or et de l'argent[235]. L'acte «illicite» auquel cet article fait allusion incluait en plus du vol le défaut de divulguer, de réaliser ou d'enregistrer une transaction visant ces métaux précieux. Ce programme administratif, ayant certainement peu à voir avec une conduite vraiment criminelle, n'a pas survécu à la codification de 1892. Toutefois, le mandat, lui, a été incorporé à l'article du *Code*, et y est demeuré jusqu'à aujourd'hui.

180. La procédure prévue à l'article 353 est tout à fait semblable à celle de l'article 443. Elle autorise cependant la fouille sur la personne. Elle ne peut en outre être prise que par une personne «ayant un intérêt dans un claim minier». Depuis la suppression du programme administratif précédemment mentionné, ce mandat semble ne se rapporter qu'à une seule disposition du *Code*: l'infraction de fraude relative aux minéraux dont traite l'article 352.

G. Le bois illégalement détenu

181. Le paragraphe 299(3) du *Code criminel* porte que:

> Un agent de la paix, qui soupçonne, pour des motifs raisonnables, que du bois appartenant à une personne et portant la marque de bois enregistrée de cette personne, est gardé ou détenu dans un endroit quelconque hors de la connaissance ou sans le consentement du propriétaire, peut entrer dans cet endroit pour s'assurer si le bois y est détenu hors de la connaissance ou sans le consentement de cette personne.

182. Cette disposition, qui autorise les perquisitions sans mandat, présente certaines similitudes avec le mandat relatif aux métaux précieux: elle tire aussi son origine d'un programme de réglementation des ressources naturelles établi au tout début de la Confédération[236]. Dans ses aspects essentiels, la réglementation en matière de marquage du bois a échappé à la législation pénale; mais la violation de ces règles a été considérée comme suffisamment grave pour être traitée dans le *Code criminel* de 1892[237], et ces dispositions y sont demeurées aujourd'hui. Les dispositions du *Code criminel* actuelles touchant cette question comprennent notamment les infractions relatives au marquage du bois des paragraphes 299(1) et (2), ainsi que les règles de preuve particulières décrites aux paragraphes 299(4) et (5).

H. Les coqs se trouvant dans une arène

183. Le paragraphe 403(2) du *Code criminel* traite de cette question. En voici le texte:

> Un agent de la paix qui trouve des coqs dans une arène pour les combats de coqs ou sur les lieux où est située une telle arène, doit s'en emparer et les transporter devant un juge de paix qui en ordonnera la destruction.

184. Ce pouvoir de saisie remonte à d'anciens textes de loi sur la cruauté envers les animaux, adoptés en Angleterre[238] et au Canada à l'époque victorienne par suite d'un mouvement social important en ce sens. Au Canada, c'est dans la loi de 1880 modifiant l'*Acte concernant la cruauté envers les Animaux*[239] que les combats de coqs ont fait l'objet de dispositions particulières. Aux termes de celles-ci,

les coqs trouvés dans une arène étaient confisqués par la municipalité, qui pouvait les vendre à son propre profit; par la suite, la loi en est venue à prévoir la destruction des volatiles. Le pouvoir de saisir les coqs n'est devenu explicite que lors de la révision de 1953-54 du *Code criminel*, lorsque le texte actuel a été adopté. Soulignons qu'aux termes de cette disposition, l'ordonnance de confiscation, bien qu'elle doive être prononcée par un juge de paix, est obligatoire sur présentation de ce volatile par l'agent de police.

I. Les objets liés à la contrefaçon

185. Voici ce que dit l'article 420 du *Code criminel* à ce sujet:

> (1) Appartient à Sa Majesté la monnaie contrefaite, les symboles de valeur contrefaits et toute chose utilisée pour la fabrication d'une monnaie contrefaite ou de symboles de valeur contrefaits, ou destinés à l'être.
>
> (2) Un agent de la paix peut saisir et détenir
>
> *a*) de la monnaie contrefaite,
>
> *b*) des symboles de valeur contrefaits, et
>
> *c*) des machines, engins, outils, instruments, matières ou choses qui ont servi à la fabrication d'une monnaie contrefaite ou de symboles de valeur contrefaits, ou qui ont été adaptés et sont destinés à telle fabrication;
>
> et toute chose saisie doit être envoyée au ministre des Finances pour qu'il en soit disposé ou qu'elle soit traitée selon qu'il l'ordonne. Cependant, une chose requise comme preuve dans une procédure ne doit être envoyée au Ministre que si elle n'est plus nécessaire aux fins de ces procédures.

186. Il ne s'agit ici, encore une fois, que d'un pouvoir de «saisie». Sont visés le papier et les instruments au moyen desquels peuvent être commises les infractions au *Code criminel* relatives à la possession de monnaie: la possession de monnaie contrefaite, par exemple (article 408), ou la possession de machines, d'outils et d'instruments servant à la contrefaçon (article 416). Mais contrairement aux cas des stupéfiants, du matériel de jeu, des coqs dans une arène et des armes offensives, le fondement de la saisie ne réside pas uniquement dans l'illégalité de la possession et dans la nécessité pour l'État de les confisquer. La disposition énonce en effet que les objets en question appartiennent à Sa Majesté. La saisie et la disposition de ces objets sont donc manifestement fondées sur le droit de propriété

revendiqué par l'État. À la lecture des débats parlementaires ayant entouré l'adoption de cette disposition en 1925, on constate que le but poursuivi était de s'assurer que le papier et les instruments saisis restent en possession de l'État, peu importe que le possesseur soit trouvé coupable ou non[240].

CHAPITRE TROIS

La nécessité d'une réforme

187. La gamme actuelle des pouvoirs de perquisition et de saisie en droit criminel est-elle satisfaisante? Tout d'abord, il suffit d'examiner les dispositions législatives elles-mêmes, leur arrangement et la façon dont elles se sont développées pour être déjà en mesure de discerner de nombreux problèmes de fond.

I. Les problèmes de la législation actuelle

188. Au lieu de traiter de toutes les difficultés particulières suscitées par chacune des dispositions relatives aux perquisitions et saisies, nous avons préféré procéder à une catégorisation des problèmes. Dans la première partie, nous nous sommes fixé pour objectif d'étudier les dispositions ayant trait aux perquisitions et saisies de façon globale; la méthode utilisée dans le présent chapitre est conforme à cet objectif. Par ailleurs, nous croyons qu'un bon nombre des problèmes sont communs à toutes les dispositions existantes dans ce domaine; cela justifie également le choix de cette méthode.

189. Voici les problèmes qui se posent, selon nous, sur le plan du droit et de la pratique:

a) l'incohérence;

b) les anachronismes;

c) l'extension des raisons justifiant l'atteinte à la vie privée;

d) l'abandon du mandat;
e) l'écart entre le droit et la pratique;
f) l'insuffisance des mécanismes de contrôle; et
g) les problèmes constitutionnels.

A. L'incohérence

190. L'observateur est sans doute frappé, en premier lieu, par les différences notables qui séparent les divers pouvoirs. C'est particulièrement vrai dans le cas des mandats. Les mandats sont obtenus par voie de dénonciation, sur demande ou à la suite d'un rapport. Ils sont délivrés par des juges de paix, des juges ou des magistrats. Si toutes les procédures, sauf une, exigent la divulgation de «motifs raisonnables de croire» dans la demande écrite, les exigences de cette croyance varient beaucoup. L'article 443 du *Code criminel* exige un lien entre les objets à saisir et une infraction. Ce lien se rapporte avant tout à la preuve. Toutefois les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* excluent la saisie d'un objet pour des fins de preuve seulement et la croyance exigée à l'article 181 ne se rapporte pas à des objets, mais uniquement à des infractions. Alors que l'article 443 porte aussi bien sur les infractions déjà commises que sur les infractions futures, l'article 181 ne vise lui que les infractions qui «sont en train de se commettre», et l'article 101 pour sa part ne fait allusion à aucune infraction. L'énumération de ces différences pourrait être continuée indéfiniment.

191. Dans son rapport intitulé *Notre droit pénal*, la Commission de réforme du droit du Canada a affirmé l'importance de l'effort de rationalisation dans la codification du droit pénal:

> À l'heure actuelle, [le Code criminel] consiste en un assemblage lourd et complexe d'articles dont certains ont été ajoutés au fur et à mesure, pour régler des problèmes particuliers qui se présentaient .... Cet excès de détails brouille le message clair, simple et direct du Code. L'on remplace par le produit d'une série d'accidents historiques le sens commun et le principe moral[241].

Des considérations de base identiques doivent s'appliquer au droit de la procédure, notamment en ce qui touche les pouvoirs de perquisition et de saisie. Il paraît en effet difficile de qualifier de véritable système, un ensemble aussi disparate. Les pouvoirs de

perquisition et de saisie ne représentent pas un ensemble ayant le caractère d'un système, mais constituent plutôt une réalité fondée sur une simple accumulation historique et même, dans plusieurs cas, sur des accidents historiques.

192. La rationalisation et la simplification des dispositions législatives ne peuvent toutefois être fondées sur de simples raisons d'esthétisme ou de théorie. Le manque de cohérence a des conséquences pratiques précises. Tout d'abord, il entraîne un certain degré de confusion administrative. Cette confusion est évidente, par exemple, à la lecture de jugements comme *Goodbaum*[242] et *Campbell v. Clough*[243], qui ont cassé des mandats de perquisition visant des stupéfiants au motif que l'on avait utilisé erronément des formulaires s'appliquant au mandat de l'article 443. Ces cas ne sont pas exceptionnels. Au cours de l'enquête sur les pratiques policières à Winnipeg, la Commission de réforme du droit a découvert, par exemple, que les forces fédérale et municipale utilisaient pour les mandats des formules tentant de combiner les exigences de l'article 443 et des dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*. Sur un échantillon de trente-neuf mandats visant des stupéfiants et des drogues, vingt-deux étaient nuls pour vice de forme en raison de cette confusion juridique[244].

193. En deuxième lieu, ce manque de cohérence ouvre la porte à certaines pratiques malhonnêtes. Si tels moyens laissent la porte ouverte à certaines justifications pour l'atteinte à la vie privée qui ne sont pas offertes par les autres, l'agent de la paix astucieux utilisera ces moyens, même s'ils n'ont pas été conçus pour le type d'enquête en cours Il n'est guère étonnant que les agents de la paix profitent de ces occasions. Dans certains cas la chose est même parfaitement compréhensible. L'agent qui, par exemple, enquête sur une infraction de trafic de drogues peut croire qu'une preuve écrite est cachée en un certain lieu. Or les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* ne lui permettent pas d'obtenir un mandat pour perquisitionner à moins qu'il ne croie également que les substances elles-mêmes s'y trouvent. Si l'agent n'est pas disposé à prêter serment sur ce fait, une autre possibilité lui est offerte: il peut recourir à l'article 443 du *Code*. Cependant, depuis l'arrêt *Goodbaum*, le mandat de l'article 443 ne peut être utilisé dans le cas des infractions visées par les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*. L'agent est donc souvent poussé à prétendre qu'il s'agit d'une infraction de complot de trafic prévue par le *Code*, prétention qui, elle, peut être bien ou mal fondée.

194. La recherche d'une certaine cohérence ne doit cependant pas conduire à une obsession d'unité, et il reste nécessaire de prévoir pour certains cas des dispositions spécifiques. Toutefois cette spécificité doit être motivée par des raisons valables. Il convient donc d'analyser de façon globale les motifs qui sont à la base de cette incohérence.

B. Les anachronismes

195. Il est étonnant de constater à quel point le fond de la procédure a peu changé depuis que, il y a trois cents ans, Sir Matthew Hale a décrit le mandat de common law sur les biens volés. Pourtant les circonstances qui étaient à la source des caractéristiques du mandat de Hale ne s'appliquent plus dans bien des cas. Le mandat, rappelons-le, a été conçu à l'origine comme un mécanisme permettant une délégation plus efficace des pouvoirs du juge de paix et lui épargnant donc le péril de se déplacer dans des conditions dangereuses. Cette efficacité, étant donné les moyens de transport et de communication d'aujourd'hui, peut sérieusement être remise en question. De plus, la procédure documentaire actuelle manque de flexibilité. Cette simple constatation montre qu'elle n'a pas évolué de façon à s'ajuster au progrès technologique. Bien plus, cette rigidité augmente l'inefficacité de la procédure puisque les contrevenants eux-mêmes utilisent des techniques toujours plus perfectionnées.

196. Par ailleurs, la plupart des pouvoirs de perquisition et de saisie visent uniquement les «choses». C'est là un autre anachronisme, particulièrement en ce qui a trait à la récupération des profits découlant de la perpétration d'un crime. Le mandat de perquisition de common law élaboré à l'origine par Hale visait les «biens» volés. L'accent était donc mis sur les objets matériels et l'on retrouve cette caractéristique dans les dispositions ultérieures sur les perquisitions et saisies en matière de vol, y compris l'actuel paragraphe 443(1) du *Code criminel*. Mais sont exclus par le fait même les fonds déposés à des établissements financiers[245] ou les données informatiques[246], qui peuvent également constituer des profits découlant de la perpétration d'un crime. Dans une large mesure, cette situation s'explique par des raisons historiques: les infractions de vol et de fraude ont toujours porté sur des biens matériels[247]. Jusqu'en 1975, d'ailleurs, l'infraction de recel actuellement définie à l'article 312 était elle-même limitée aux choses matérielles[248]. L'extension de ces infractions en droit

criminel pour inclure les choses intangibles exige également la modernisation du droit des perquisitions et saisies.

197. Outre ces questions de procédure se pose la question de l'actualité de certaines conceptions qui sont à la base de dispositions particulières sur les perquisitions et saisies. Les dispositions qui viennent sans doute le plus spontanément à l'esprit sont les pouvoirs ayant trait aux maisons de jeu et aux maisons de débauche. La question de savoir si ces dispositions reflètent les attitudes sociales modernes soulève la question de l'opportunité d'abolir les infractions elles-mêmes en même temps que les procédures[249]. Cependant la base conceptuelle de ces pouvoirs mérite une étude particulière, puisqu'ils indiquent que ces activités sont considérées non seulement comme des crimes, mais comme des maux sociaux requérant le maintien d'une procédure spéciale. Dans un domaine moins important, il est possible de s'interroger sur la pertinence des dispositions particulières concernant les métaux précieux. Si le programme administratif en fonction duquel le pouvoir de perquisition a été pour une grande part créé n'existe plus, comment peut-on encore justifier sa survivance?

C. L'extension des raisons justifiant l'atteinte à la vie privée

198. De façon constante, l'extension du pouvoir de perquisition a eu tendance à donner à l'État des justifications toujours plus nombreuses pour empiéter sur le domaine de la vie privée. Cette prolifération ne s'est naturellement pas limitée aux pouvoirs policiers en droit pénal. Au cours des cinquante dernières années, on a assisté à une augmentation importante des rôles réglementaire et de redistribution que le gouvernement joue. L'accroissement des pouvoirs policiers présente cependant un caractère particulier. Il ne représente pas une véritable prise en charge d'un nouveau rôle par l'État, mais plutôt un constant ajustement de ses droits et de ses pouvoirs dans le cadre d'une mission déjà définie. En Angleterre et au Canada, au cours des trois derniers siècles, traditionnellement et de façon relativement constante l'État a été considéré comme le gardien de la paix et le protecteur de la sécurité des personnes. Un changement radical semble s'être produit au niveau du poids relatif accordé aux droits sociaux, par opposition aux droits individuels, et

donc au niveau du maintien de l'ordre qui est jugé approprié pour maintenir l'équilibre entre les deux.

199. Un bon nombre d'activités auxquelles cette situation a donné lieu sont considérées par les Canadiens comme allant de soi dans une société bien gouvernée. Pourtant, certains autres pays de common law se sont montrés beaucoup plus réticents à faire les concessions que les Canadiens ont faites au nom de l'efficacité de la loi. Un exemple frappant et peut-être étonnant reste toutefois celui du mandat de perquisition touchant les éléments de «preuve d'une infraction» qui ne porte ni sur des biens volés, ni sur de la contrebande. La "British Royal Commission on Criminal Procedure" a récemment recommandé que soient créés pour la première fois en Angleterre des ordonnances et des mandats autorisant la saisie de ces éléments de preuve. C'est cependant avec hésitation qu'elle a présenté ses recommandations en les assortissant de restrictions très importantes. Ce pouvoir resterait un pouvoir de dernier ressort, ne pouvant être invoqué que dans des circonstances exceptionnelles et seulement dans le cas d'infractions graves[250]. Le simple fait que le mandat de l'article 443, qui autorise la perquisition visant un élément de preuve relatif à une infraction quelconque du *Code*, soit en vigueur au Canada depuis quatre-vingt-dix ans montre bien la facilité relative avec laquelle les pouvoirs de perquisition ont pris de l'extension dans notre pays.

200. L'une des caractéristiques marquantes de cette extension réside dans le fait que ces pouvoirs, qui constituaient essentiellement un mécanisme de réaction de la justice, ont été amenés à remplir aussi une fonction de prévention. Il s'agit là dans une certaine mesure d'une distinction arbitraire; comme le faisait remarquer un inspecteur de la G.R.C., [TRADUCTION] «[n]ous *réagissons* en prenant des mesures préventives de la même façon que nous réagissons à un crime par l'application de la loi, c'est-à-dire après le fait[251]». Cette distinction est cependant importante en ce qu'elle a constitué le centre d'un grand nombre de transformations profondes dans le domaine des pouvoirs de la police en général, et en particulier dans celui des pouvoirs de perquisition et de saisie.

201. Les premiers pouvoirs de perquisition et de saisie, antérieurs à la création des premiers corps policiers, constituaient essentiellement un acte de réaction à la perpétration d'un crime. Ils étaient en fait étroitement liés au pouvoir d'arrêter le criminel. Le mandat de common law s'appliquant aux biens volés répondait à la conception suivante: la victime d'un crime dépose une plainte auprès du juge de paix, qui peut délivrer un mandat pour que soit amené

devant lui le possesseur illégal, et remettre ensuite les biens à la victime. En common law, le pouvoir de fouiller des personnes sans mandat était étroitement lié au pouvoir d'arrestation. À mesure que les pouvoirs se sont élargis, ce lien s'est estompé.

202. La première dérogation importante est survenue lorsque le projet de code de 1880 a suggéré de viser aussi les objets *dont on a l'intention de se servir* dans le but de commettre une infraction. Cette disposition, malgré son aspect préventif, restait centrée sur l'idée de justifier l'atteinte au nom d'un comportement criminel particulier, *même si* celui-ci ne s'était pas encore manifesté. Les plus récentes dispositions sur les armes à feu, prévues à l'article 101 du *Code criminel*, ne comportent pas elles de telles restrictions. Les motifs de sécurité invoqués ne visent même pas nécessairement la perpétration éventuelle d'un acte criminel. Le pouvoir conféré par l'article 101 est tel qu'il permet à ceux qui exécutent le mandat non seulement de prévenir les crimes, mais aussi de décider dans quelles circonstances ou pour quel acte une atteinte préventive peut être justifiée.

203. L'existence d'une procédure *in rem* est une autre manifestation d'élargissement des justifications de ces atteintes. L'article 160 n'entre en jeu que pour la perpétration d'une infraction (la détention de choses obscènes aux fins de vente ou de distribution). Tel n'est pas le cas pour l'article 281.3 (à moins que la détention des publications aux fins de distribution ne constitue une infraction non parfaite comme par exemple un complot ou une tentative de diffuser de la propagande haineuse). Il est remarquable de constater que ces procédures établissent un système parallèle de décision se situant hors du cours ordinaire de l'inculpation, du procès, de la déclaration de culpabilité et de la sentence. Personne n'est en effet cité à procès lors d'une procédure *in rem*; ce sont plutôt les choses elles-mêmes qui subissent le procès. Le crime ayant par essence un caractère personnel, le lien entre le crime et l'atteinte est profondément modifié par les pouvoirs établis en vertu de ces articles.

204. Cette transformation des justifications de ces atteintes n'a été accompagnée d'aucune évaluation générale de son incidence sur l'équilibre entre les pouvoirs de la police et les droits individuels. La tendance a été davantage à constater cette incidence dans le domaine particulier d'application sans voir ses effets sur la situation générale. Le temps est cependant venu de reconnaître que ces changements ont eu un effet sur l'équilibre global entre les pouvoirs policiers et les droits du citoyen. Il est donc important de reprendre à la base les grands principes qui justifient les perquisitions et les saisies. Il importe aussi que les dérogations à ces règles générales soient considérées comme telles et analysées dans cette perspective.

D. L'abandon du mandat

205. Une autre tendance récente est la création d'exceptions importantes aux conditions du mandat, en particulier en ce qui a trait aux perquisitions et saisies dans des lieux privés. Traditionnellement, en common law, seuls deux types de fouilles, outre les fouilles «de consentement», pouvaient être effectués sans mandat dans des lieux privés: la fouille accessoire à l'arrestation et la fouille pratiquée pour protéger la vie de personnes ou assurer leur sécurité. Cependant, au fur et à mesure de l'expansion des pouvoirs législatifs de perquisition, le mandat a été de moins en moins utilisé aussi bien en matière de lois fédérales en général qu'en matière de dispositions particulières du droit criminel relatives aux perquisitions et visant les armes, les stupéfiants et les drogues. D'une certaine façon, cette tendance représente le complément de la prolifération des justifications de l'atteinte. Non seulement l'ordre temporel a-t-il été assoupli, mais aussi les exigences de procédure pour l'obtention d'une autorisation. Ces deux phénomènes traduisent une tendance à conférer plus de pouvoirs aux forces policières: celles-ci se voient accorder les mêmes pouvoirs pour la prévention du crime que ceux dont elles disposent pour faire enquête sur le crime. Elles décident donc de plus en plus elles-mêmes les cas où elles seront justifiées d'exercer leurs pouvoirs.

206. Nous avons déjà souligné dans le présent document de travail que le pouvoir de perquisition et de saisie sans mandat, théoriquement restreint par des exigences de «motifs raisonnables», constitue un mode d'autorisation conférant un pouvoir relativement discrétionnaire[252]. Essentiellement, le pouvoir discrétionnaire acquis par l'agent de la paix, particulièrement en ce qui concerne l'entrée dans des lieux privés, est d'une ampleur et d'une diversité inimaginables à l'époque où les premiers mandats de perquisition et de saisie de common law ont été élaborés. Les pouvoirs coercitifs de l'agent de la paix, joints à la possibilité, reconnue en droit, d'effectuer des fouilles «de consentement», représentent une gamme redoutable de pouvoirs discrétionnaires.

207. L'importance décroissante du mandat n'est pas simplement le résultat d'un choix de la part du législateur; il semble plutôt s'agir d'une caractéristique des pratiques policières. Du reste, l'adjonction aux règles existantes d'une disposition autorisant les perquisitions et saisies sans mandat est susceptible de réduire fortement le recours aux mandats. Un exemple: depuis l'introduc-

tion, en 1977, du pouvoir d'effectuer des perquisitions et saisies sans mandat en vertu de l'article 101, le recours au mandat prévu par cette même disposition semble avoir pratiquement disparu; on a expliqué ce phénomène en disant que les querelles de ménage et entre voisins visées par l'article 101 présentent habituellement un caractère d'urgence[253]. Dans un bon nombre des cas où il y a eu entrée dans des lieux sans mandat en vertu du paragraphe 101(2), les policiers auraient sans doute agi de la même façon même en l'absence de cette disposition, en invoquant le devoir d'assurer la paix publique, mais la légalité de ces entrées n'aurait alors pas été certaine, surtout à la lumière de l'affaire *Colet*[254]. L'adoption du paragraphe 101(2) a indubitablement entraîné une diminution, chez les policiers, du recours au mandat à titre de fondement légal d'une entrée dans des lieux pour les fins prévues à l'article 101 dans son ensemble.

208. Le recours aux pouvoirs de perquisition et saisie sans mandat pour pénétrer dans des lieux privés ne se limite pas aux situations mettant en jeu des armes à feu. Dans une récente étude d'observateurs participants, effectuée en Ontario, vingt-sept entrées dans des lieux ont été décrites; sur ce nombre, dix avaient été effectuées sans mandat de perquisition. Dans huit cas sur dix, il y a eu arrestation des occupants, mais il semble que les perquisitions elles-mêmes ont souvent été pratiquées avec le consentement des personnes visées[255]. Ces observations sont conformes aux renseignements communiqués à nos recherchistes lors de discussions avec les membres de diverses forces policières canadiennes au sujet des perquisitions effectuées avec le consentement des occupants. Ces discussions ont en fait révélé l'existence de toute une gamme d'attitudes. Pour certains agents, il est préférable dans tous les cas d'obtenir un mandat, alors que selon d'autres, il est souvent permis de tenter d'obtenir le consentement avant de recourir à la procédure du mandat. Les membres de certaines forces policières ont déclaré que le consentement à la perquisition dans des lieux privés avant l'obtention d'un mandat était demandé seulement aux personnes arrêtées hors des lieux en question. Le consentement de l'occupant peut sembler supprimer les inquiétudes suscitées par l'absence de mandat; nous croyons cependant que dans ces cas, des problèmes se posent sur le plan des mécanismes de contrôle, dont nous parlerons un peu plus loin[256].

209. Si le mandat a perdu de son importance, ce n'est pas vraiment que l'on juge préférable de conférer à la police le pouvoir décisionnel en la matière, mais étant donné les lacunes de la procédure du mandat, c'était la seule solution possible. Dans certains

cas, c'est un problème d'efficacité: la procédure du mandat est jugée trop lente pour répondre adéquatement à certaines situations. Dans une enquête de la Commission, environ 74 pour cent des agents à qui l'on demandait pourquoi ils utilisaient un mandat de main-forte de préférence à un mandat régulier, ont invoqué l'urgence sous l'une ou l'autre de ses formes comme motif[257]. Cette prétention accentue la nécessité d'étudier l'inefficacité inhérente à la procédure du mandat. S'il est possible de faciliter, sur le plan technique, l'obtention du mandat sans que ses caractères judiciaire et de spécificité n'en souffrent, la nécessité d'adopter d'autres formes d'autorisations plus efficaces se trouve diminuée. Mais il convient d'étudier avec soin les arguments ayant trait à la nécessité, invoqués à l'appui de l'extension des pouvoirs de perquisition et saisie sans mandat.

210. Pour traiter cette question, on peut prendre le cas de certains pouvoirs spéciaux, par exemple ceux dont jouissent les détenteurs de mandats de main-forte. Les partisans de ce mandat invoquent les difficultés inhérentes aux enquêtes en matière de stupéfiants et de drogues, en particulier la nécessité fréquente d'obtenir rapidement l'autorisation. Un surintendant de la G.R.C., comparaissant devant un comité parlementaire, disait récemment, par exemple, que «des actions spontanées sont nécessaires pour nous permettre d'intercepter les stupéfiants comme tels[258]». Bien sûr, le pouvoir spécial conféré par le mandat de main-forte d'entrer dans des lieux privés sans mandat conduit à des «actions spontanées»; on peut cependant se demander si l'utilisation de ce mandat est nécessaire. D'après une étude de la Commission, le pouvoir conféré par le mandat de main-forte est souvent invoqué dans des cas où des solutions à caractère plus général, par exemple le pouvoir d'entrer dans des lieux à l'occasion d'une arrestation[259], pourraient être adoptées par les enquêteurs[260].

211. Il faut cependant élever le débat en se demandant si le recours à des pouvoirs de perquisition et de saisie sans mandat est justifié étant donné l'existence de pouvoirs avec mandat. Tant dans les lois américaines que dans la jurisprudence sur le quatrième amendement, on trouve exprimée une préférence pour les autorisations par voie de mandat, sous réserve des cas où sont justifiés des modes d'autorisation sans mandat[261]. Au Canada, en revanche, les pouvoirs de perquisition et de saisie sans mandat ont été élaborés à la pièce, pour remédier à des problèmes bien précis. Il n'a donc pas été possible de faire explicitement de cette préférence un principe de base en droit canadien. Comme nous l'avons déjà souligné, il n'est pas impossible que l'article 8 de la *Charte*

canadienne des droits et libertés ait cet effet; même si ce n'était pas le cas, nous considérons toutefois que cette préférence pour le mandat représente un principe sain et utile.

E. Le fossé existant entre le droit et la pratique

212. La conformité des pratiques policières avec les dispositions légales applicables représente une question importante à l'égard de nombreux aspects des perquisitions et saisies, mais c'est sans doute dans le contexte de la délivrance du mandat qu'elle est la plus facile à vérifier. Cela résulte dans une large mesure du caractère documentaire de cette procédure, qui en facilite l'examen et l'appréciation. C'est pourquoi, dans notre programme de recherche, nous avons étudié les pratiques en matière de délivrance de mandat de perquisition sur une période de quatre mois dans sept villes canadiennes: Edmonton, Fredericton, Montréal, Saint-Jean (N.-B.), Toronto, Winnipeg et Vancouver. Seuls les mandats pouvant être délivrés par un magistrat ou un juge de paix faisaient l'objet de l'étude; cette dernière ne visait donc pas les mandats délivrés en vertu des articles 160 et 281.3. Notre but, dans cette recherche, consistait notamment à obtenir une appréciation valable de la légalité des mandats de perquisition délivrés dans ces villes; nous avons donc formé un comité de juges canadiens de cours supérieures et d'appel afin d'étudier un échantillon aléatoire stratifié des documents relatifs aux demandes (dénonciations ou rapports écrits) ainsi que des mandats faisant l'objet de notre étude. Les résultats détaillés de ces appréciations sont présentés dans d'autres documents[262], mais la conclusion est simple: il existe un écart marqué entre les dispositions légales régissant la délivrance et l'obtention des mandats de perquisition, et les réalités de la pratique quotidienne.

213. Le comité des juges a considéré que 39,4 pour cent des mandats faisant partie de l'échantillon avaient été valablement délivrés, et que 58,9 pour cent d'entre eux ne l'avaient pas été. Les 1,7 pour cent manquants n'ont pu être appréciés de façon certaine à cause d'une documentation imprécise ou incomplète[263]. Le comité des juges a constaté que les documents ayant trait à des mandats émis en vertu de la *Loi sur les stupéfiants*, de la *Loi des aliments et drogues* et de l'article 443 contenaient le plus de vices entraînant la nullité. La proportion des mandats valides a dépassé celle des mandats invalides seulement dans le cas des mandats émis en vertu

de l'article 181 du *Code*, dont les exigences sont beaucoup moins rigoureuses.

214. Quels sont les motifs de la non-validité des mandats? Ils ne se fondaient pas habituellement sur des vices de forme. En fait, les résultats concernant à la fois les demandes écrites (dénonciations ou rapports) et les mandats eux-mêmes furent encourageants sur le plan du respect des conditions de forme. Parmi ceux à propos desquels on a pu tirer une conclusion définitive, 85,5 pour cent des demandes et 73,5 pour cent des mandats ont été jugés valides sur le plan de la forme[264]. Les vices de forme se trouvaient surtout dans les mandats émis en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* et avaient tendance à être relativement importants. Certains consistaient en de simples erreurs d'écriture, comme par exemple l'omission accidentelle de la signature d'un juge de paix. D'autres permettent de constater au contraire que certains corps policiers ont l'habitude de ne pas respecter les exigences de la loi. Ainsi, les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* en vertu desquelles le mandat doit indiquer le nom de l'agent chargé de l'exécuter, étaient souvent ignorées à Montréal et à Winnipeg.

215. Le caractère négatif de ces résultats s'est accentué lorsque les critères de force probante et de fond furent pris en considération. Dans le cas des mandats de l'article 443 et des *Loi sur les stupéfiants* et *Loi des aliments et drogues*, le critère déterminant en ce qui concerne la force probante réside dans la présentation des motifs raisonnables de croire. Cette exigence assure que l'émission du mandat a un caractère «judiciaire»[265]. Le comité des juges a constaté que ce critère avait été rempli dans 67,8 pour cent des cas évalués, et qu'il ne l'avait pas été dans 32,2 pour cent des cas. Il est quelque peu désolant que la proportion des mandats émis dans le respect du caractère judiciaire ne soit que de deux sur trois. La répartition statistique en ce qui a trait aux exigences de fond est encore pire. Celles-ci visent pour une bonne part à assurer au mandat ses qualités de «spécificité»[266]: individualiser les objets qui doivent être saisis et identifier les lieux de la perquisition et les infractions présumées. Pour l'ensemble des demandes retenues il a été possible de constater que seulement 53,8 pour cent d'entre elles étaient conformes aux critères de la loi à cet égard. Pour les mandats, ce chiffre n'était que de 48,7 pour cent.

216. Si, d'une façon générale, les documents relatifs aux mandats n'étaient pas conformes à la loi, cela ne signifie pas pour autant que la plupart des perquisitions effectuées en vertu de ces

mandats n'auraient pu être légalement autorisées. Le fait que 61,6 pour cent des mandats exécutés mentionnés dans l'enquête effectuée à travers le pays aient permis la saisie de l'objet ou du type d'objet précisé dans le mandat tend à indiquer que dans de nombreux cas les policiers se sont effectivement fondés sur des faits précis pour entreprendre la perquisition[267]. En fait, l'analyse des documents de l'échantillon soumis au comité des juges ne révèle aucun véritable rapport entre la légalité de la perquisition et la saisie éventuelle de l'objet mentionné[268]. Il est donc peu probable que l'illégalité du mandat puisse être attribuée au fait que la police décide de faire des perquisitions inappropriées. Le problème semble plutôt en être un de respect des règles. En d'autres termes, il se peut fort bien que la perquisition soit correctement fondée sur le plan des faits, mais que le mandat ait quand même été délivré de façon irrégulière.

217. L'aspect le plus frappant des résultats réside sans doute dans la constatation que le respect des exigences ayant trait aux mandats dépend dans une large mesure des usages locaux. C'est à Vancouver que le bilan se révèle le plus positif: 71 pour cent des mandats y ont été délivrés de façon valide. Inversement, à Montréal, la proportion n'est que de 17 pour cent. Entre ces deux extrêmes se situent Toronto avec 50 pour cent, Edmonton avec 36 pour cent et Winnipeg avec 27 pour cent[269]. Ces différences peuvent être attribuées à certains particularismes locaux. Par exemple, la faible proportion dans le cas de Winnipeg et d'Edmonton découle en partie du fait qu'on y utilisait en 1978 des formules inadéquates pour les mandats en matière de drogues et de stupéfiants. À Montréal, d'un autre côté, au moins une cour avait pris l'habitude de n'exiger aucune description écrite des motifs raisonnables justifiant l'émission d'un mandat.

218. Ces faits soulèvent une question importante: pourquoi a-t-on laissé les diverses villes déterminer en pratique les procédures qu'elles devaient suivre? Comment expliquer de telles différences et de telles variations dans un système juridique dont les règles de procédure criminelle sont censées être déterminées par la législation fédérale? Une conclusion évidente peut être tirée au départ: il n'existe pas de mécanismes assurant l'application efficace des dispositions légales. Il s'agit là, sans aucun doute, d'un problème sérieux, dont nous traiterons en détail dans le dixième chapitre du présent document de travail. Pour l'instant, nous pouvons donner certaines explications tirées de notre étude empirique.

219. Les solutions locales visent à remédier aux lacunes de la législation existante. Par exemple, l'article 443 exige que les

dénonciations soient rédigées selon la formule 1. Or, celle-ci, de la façon dont elle est décrite au *Code* lui-même, ne satisfait même pas aux exigences de l'article 443[270]. Face à ce dilemme, diverses villes ont élaboré des variantes de cette formule 1. À Winnipeg et à Montréal, les cours de la même ville utilisaient même des formules radicalement différentes, qui servaient ensuite à la préparation des documents pour les demandes faites selon la *Loi sur les stupéfiants* et la *Loi des aliments et drogues* (qui n'imposent aucune formule). Ainsi donc, les variations dans les pourcentages de validité entre les diverses villes reflètent jusqu'à un certain point la marge de succès de ces tentatives improvisées.

220. Un élément plus significatif doit aussi être considéré: les attitudes à l'égard de la délivrance de mandats de perquisition varient selon chaque ville. En dépit du fait que la jurisprudence a souvent fait allusion à l'importance en common law d'empêcher les atteintes injustifiées aux droits individuels, la procédure du mandat n'a pas toujours été considérée comme une procédure judiciaire. Un rapport récent portant sur une étude du travail des détectives dans une région située à proximité de Toronto comporte le passage suivant:

> [TRADUCTION]
> «Les détectives entretenaient depuis longtemps des rapports avec certains juges de paix et comptaient sur la collaboration habituelle de ces derniers pour faciliter leur tâche. Ainsi, un détective a révélé qu'en général, il allait voir seulement deux des quatre juges de paix de sa région divisionnaire parce qu'il entretenait «de bons rapports avec eux», ce qui en clair signifie qu'il pouvait compter sur leur «collaboration». À l'occasion, cette collaboration allait beaucoup plus loin que la signature de mandats sans poser de questions. Une fois, par exemple, deux détectives se rendirent à cinq adresses principalement dans le but de savoir où se trouvait un suspect. Craignant une certaine résistance de la part des occupants, ils apportèrent des mandats de perquisition non signés qu'ils signèrent «de la main gauche» (signèrent du nom d'un juge de paix) en se rendant sur les lieux. Ces mandats furent ensuite portés aux dossiers de la division et les policiers rencontrèrent les deux juges de paix dont le nom avait été utilisé pour s'assurer leur concours. Une autre fois, les détectives, en arrivant à un certain endroit pour y effectuer la fouille des lieux, se rendirent compte que le juge de paix avait daté le mandat mais avait par erreur omis de le signer. Un des détectives signa alors du nom du juge de paix et entreprit la perquisition, en faisant le commentaire suivant: «C'est comme dans le bon vieux temps, on signe un mandat de la main gauche»[271].

221. Mais on craint surtout que le juge de paix ne considère la délivrance du mandat de perquisition comme une «formalité»[272].

L'obtention du mandat ne représentait nullement une «formalité» dans aucune des villes sur lesquelles a porté l'enquête. Cependant, dans certains cas, les renseignements fournis dans la demande étaient si vagues que l'on peut se demander si la personne délivrant le mandat s'est vraiment souciée d'évaluer les documents soumis. À Montréal, par exemple, seule une faible proportion des dénonciations portaient des explications suffisantes sur les motifs de l'agent. Dans certains cas, on se contentait d'écrire que des motifs raisonnables découlaient des enquêtes faites par la police. Ce genre de description ne donne à celui qui prend la décision aucun critère objectif pour déterminer judiciairement si le mandat doit ou non être émis. Le fait de s'en remettre simplement aux allégations du policier qu'il a des motifs pour se livrer à une perquisition, équivaut à enlever presque toute signification à la procédure du mandat.

222. Cette constatation ne signifie pas cependant que ceux qui émettent les mandats ne sont pas conscients de l'importance de leur rôle. En fait, l'enquête a révélé des cas où non seulement les officiers de justice locaux se conformaient aux exigences du *Code*, mais où ils imposaient en outre des garanties additionnelles de leur propre cru. Par exemple, les juges et les juges de paix d'Edmonton ont pris l'habitude d'inscrire une date d'expiration sur les mandats qu'ils délivrent, même s'il n'existe aucune exigence légale à cet égard. En outre, il est possible que dans certaines villes, les normes soient devenues plus sévères depuis que l'enquête a été effectuée. Par exemple, lors de conversations récentes avec les fonctionnaires à Montréal, les recherchistes de la Commission se sont laissé dire que les pratiques locales avaient été améliorées de façon substantielle, par l'adoption de nouvelles procédures et le congédiement de certaines personnes chargées de la délivrance des mandats parce qu'elles n'avaient pas rempli leur rôle de façon suffisamment judiciaire. En fin de compte, cependant, ces différences laissent croire que le fait d'assurer un rôle judiciaire reste un choix exercé à l'échelon local par ceux qui émettent les mandats.

223. Dans une certaine mesure, les policiers sont eux aussi responsables de la qualité des demandes d'émission de mandats puisque ce sont eux qui en général remplissent les documents. Les manuels de formation des policiers décrivent les critères pertinents qui doivent leur servir de guide. Pourtant, les représentants de la police et les officiers de justice, ne semblent pas estimer réaliste de s'attendre à ce que les agents se conforment à ces exigences. Cette opinion, dont il a été fait part aux recherchistes de la Commission lors des consultations, permet de comprendre à la fois le caractère négatif de l'appréciation

faite par le comité des juges, et l'indulgence de certains officiers de justice à l'égard de documents mal préparés. Certains juges ont carrément déclaré être disposés à être moins exigeants sur certaines subtilités juridiques, en particulier en cas d'urgence ou lorsqu'il est tard dans la nuit.

224. Les plaintes concernant la difficulté de préparer les mandats de perquistion rappellent les problèmes auxquels nous avons fait allusion plus haut à propos de l'état anachronique et incohérent de la loi. Les difficultés n'ont cependant pas pour effet de rendre les règles relatives au mandat impossibles à suivre. Ainsi à Vancouver, du moins, la proportion de procédures correctement remplies reste élevée. Comment se fait-il que les agents de cette ville aient beaucoup mieux réussi que la moyenne nationale? Les données disponibles ne permettent de formuler que des hypothèses. Le phénomène peut être attribué de façon générale à l'évolution des usages locaux et aussi au fait que l'on s'assurait que les formules utilisées étaient adéquates. En outre, les juges de paix de cette province sont choisis par le conseil judiciaire provincial parmi les administrateurs des tribunaux et ils ont l'avantage de pouvoir suivre des programmes de formation poussés.

225. Il faut aussi noter que les crimes économiques représentent dans cette ville une part élevée des infractions qui font l'objet d'enquêtes avec mandat de perquisition. Un tiers environ de l'ensemble des documents de l'échantillon provenant de Vancouver avait trait à ce genre d'enquête[273]. Les documents portant sur des crimes économiques n'étaient pas tous valides. En fait seuls 69 pour cent l'étaient, proportion légèrement inférieure à l'ensemble de l'échantillon de cette ville. Cependant, les erreurs commises avaient tendance à être isolées (par exemple l'omission d'une signature sur un document par ailleurs parfait). Dans l'ensemble, les mandats reliés à des crimes économiques comportaient beaucoup de renseignements, non seulement à Vancouver mais aussi à Toronto et à Fredericton. Il n'est pas inhabituel dans ces cas de voir des dénonciations s'étendre sur trois pages supplémentaires où sont fournies des précisions sur l'infraction alléguée et sur les liens existant entre elle et les objets en possession de la personne visée. Autrement dit, même les dénonciations invalides fournissaient au juge de paix une base décisionnelle utile.

226. Pourquoi ces documents en particulier? Les opérations constituant un complot ou une fraude étant habituellement complexes, il est sans doute naturel que leur description soit plus détaillée. Qui plus est, les mandats relatifs aux crimes économiques sont préparés dans la perspective d'une éventuelle contestation. Il est

donc fréquent que le substitut du procureur général participe à la préparation de la demande. Que l'on fasse ou non appel à lui, il semble clair que plus l'on s'attend à ce que la légalité d'une telle perquisition soit contestée, plus la qualité des demandes présentées s'accroît.

227. Le rôle du mandat est de protéger toutes les personnes dont les droits risquent d'être violés par l'atteinte autorisée par lui, et non pas seulement les droits de ceux qui ont la possibilité sur le plan juridique de contester cette atteinte. L'existence d'un double critère dans la préparation des mandats de perquisition donne à tout le moins à penser qu'il y a place pour une réduction des disparités entre le droit et la pratique.

F. L'insuffisance des mécanismes de contrôle

228. En un certain sens, les insuffisances sur le plan de la délivrance des mandats, dont nous venons de parler, sont le résultat de lacunes dans les mécanismes de contrôle. À cet égard, les problèmes reliés aux perquisitions et saisies sans mandat sont cependant d'une gravité encore plus grande. Bien que la délivrance soit sommaire, le mandat offre certaines protections. Dans l'affaire *MacIntyre*, par exemple, il a été décidé que les documents relatifs à une demande de mandat de perquisition font partie du dossier du tribunal et peuvent être consultés par la personne visée et par le public après l'exécution de la perquisition et la saisie de l'objet[274]. Ce droit d'accès aux dossiers facilite notamment la vérification de la légalité du mandat. À l'opposé, les mécanismes de contrôle en matière de perquisition et de saisie sans mandat sont restreints, de façon générale, par les caractéristiques particulières du travail de la police[275]: la personne lésée par une perquisition ou une saisie sans mandat ne peut, de droit, consulter aucun type de dossier documentaire.

229. Ces questions de procédure ne sont pas les seuls obstacles à un contrôle efficace. Ce dernier est également rendu plus difficile par l'existence d'un pouvoir de perquisition et saisie sans mandat. Pour illustrer ce problème, nous nous servirons de l'exemple du pouvoir de fouiller des personnes avec leur consentement. Selon des études d'observateurs participants, le consentement des suspects à des fouilles effectuées sur leur personne par des agents de ronde est la norme[276]; cela confirme les renseignements donnés par les agents de

police consultés par la Commission. Mais si l'on en croit les résultats d'entrevues avec les suspects eux-mêmes, ce consentement n'est pas donné librement. Sur un échantillon de suspects, dans une étude récente, plus de la moitié ont dit s'être conformés à la volonté des policiers parce qu'ils croyaient que ces derniers ont le pouvoir de pratiquer des fouilles quand bon leur semble. D'autres suspects ont fait allusion à des menaces et aux pouvoirs liés à l'arrestation[277]. On peut avoir des réserves quant à la véracité de ces propos, mais cela ne fait que confirmer la difficulté de vérifier s'il y a véritablement eu consentement.

230. Comme nous l'avons déjà vu, les perquisitions dans des lieux privés sont souvent fondées elles aussi sur le consentement[278]. Les agents de la paix semblent considérer le consentement comme un moyen parmi bien d'autres pour entrer dans des lieux privés et la valeur qu'on lui attribue à ce titre varie selon les corps policiers. On a ainsi pu observer que souvent les agents de la paix cherchent à obtenir le consentement de l'occupant même s'ils disposent déjà d'un mandat. Dans de tels cas, leur stratégie est de tenter de profiter des avantages psychologiques et juridiques additionnels qu'offre selon eux l'obtention du consentement, car ils peuvent toujours invoquer le mandat si cela s'avère nécessaire[279].

231. C'est parce que dans de nombreux cas la fouille ou la perquisition est fondée sur le consentement qu'il est difficile d'en vérifier la légalité. En premier lieu, il peut être difficile de déterminer d'une façon certaine l'existence du consentement si la question est soulevée après la fouille: l'acquiescement passif d'une personne à la demande d'un agent ne traduit pas nécessairement un consentement donné librement. Certains agents de la paix ont d'ailleurs avoué à des chercheurs de la Commission que le véritable consentement à une fouille de personne effectuée par un agent de police était sans doute chose rare; ce serait plutôt par un effet d'intimidation que les gens offrent leur collaboration. Aucune procédure n'a été instituée à l'intention de ces agents pour leur permettre de s'assurer de l'existence d'un véritable consentement à la fouille. Certaines divisions de la G.R.C. utilisent en revanche des formules d'attestation de consentement lors des perquisitions.

232. En second lieu, on peut imaginer que parfois, le consentement est donné à l'égard de perquisitions qui, autrement, n'auraient pu être autorisées par aucun pouvoir existant, vu l'inexistence de motifs suffisants pour invoquer de tels pouvoirs. Nous avons rencontré, dans nos études empiriques, un exemple de ce problème: il s'agit des fouilles de personnes pratiquées lors de

l'exécution de mandats délivrés en vertu de l'article 443 du *Code criminel* et d'autres dispositions n'autorisant pas ce type de fouille. Seul un faible pourcentage de fouilles de personnes ont été expliquées par rapport à une arrestation ou à d'autres motifs liés à un besoin de protection et susceptibles de permettre le recours à des pouvoirs existants. En fin de compte, quelque 82,6 pour cent des fouilles de personnes effectuées lors de l'exécution de ces mandats l'ont été, selon les renseignements fournis, pour des fins non prévues par les règles de droit actuelles[280]. Lors de conversations avec les chercheurs de la Commission, certains représentants de la police ont mentionné que ces fouilles avaient peut-être été autorisées par le consentement des personnes visées. Même si c'était exact, cela ne ferait que démontrer l'insuffisance, en droit actuel, des mécanismes de contrôle sur l'activité de la police dans ce domaine. Par l'obtention du consentement à la fouille dans de tels cas, les agents de police brouillent en fait la distinction entre les fouilles légitimes et les fouilles injustifiées.

G. Les problèmes constitutionnels

233. L'adoption de l'article 8 de la *Charte canadienne des droits et libertés* pourrait rendre inconstitutionnels de nombreux pouvoirs de perquisition et de saisie du droit criminel actuel. La question demeurera dans une large mesure hypothétique tant que les tribunaux n'auront pas donné une interprétation définitive à l'article 8. Mais quoi qu'il en soit, la protection contre «les fouilles, perquisitions ou saisies abusives» pourrait exiger la formulation de certaines garanties constitutionnelles fondamentales[281]. On peut notamment penser à l'obligation d'avoir des motifs «raisonnables» de croire avant d'entrer dans des lieux privés ou de fouiller une personne, et à la limitation de l'emploi de la force, au cours des perquisitions, à ce qui est raisonnable.

234. En fait, un grand nombre des dispositions existantes en matière de perquisition et de saisie ne comportent pas de telles garanties. Comme nous l'avons déjà souligné[282], les agents de la paix peuvent fouiller toute personne se trouvant dans des lieux où ils sont entrés en vertu des dispositions de la *Loi sur les stupéfiants* ou de la

Loi des aliments et drogues, sans qu'il leur soit nécessaire d'avoir des motifs raisonnables de croire à l'existence de liens entre ces personnes et une infraction pertinente. En outre, l'emploi de la force pour ouvrir les portes et les contenants lors d'enquêtes en matière de stupéfiants et de drogues n'est limité par aucun critère relatif aux motifs raisonnables[283]. Pour certains, de telles dérogations aux critères constitutionnels représentent une question devant être résolue exclusivement par les tribunaux, mais nous n'acceptons pas ce point de vue. Nous considérons plutôt ces dérogations comme des problèmes liés aux dispositions existantes et devant être rectifiés.

235. Outre la question des pouvoirs dont l'inconstitutionnalité est inhérente, se pose le problème de l'exercice des pouvoirs d'une manière inconstitutionnelle. Il est peu vraisemblable, comme nous l'avons déjà souligné, que les tribunaux tiennent des vices de forme et des violations techniques des règles de procédure par les agents de la paix, pour une violation de l'article 8[284]. En revanche, pourraient très bien tomber sous le coup de cette disposition les cas où un mandat de perquisition est délivré en l'absence de motifs raisonnables de croire. Si l'article 8 était appliqué de cette manière, la proportion des mandats qui, dans notre enquête, ne satisfaisaient pas aux exigences des «motifs raisonnables»[285] acquerrait une importance nouvelle. Délivrés aujourd'hui sur le même fondement, ces mandats seraient inconstitutionnels et invalides.

236. L'article 8 pourrait avoir des conséquences non seulement sur la validité des perquisitions et des saisies avec mandat, mais également sur celle des fouilles sans mandat effectuées dans la rue. Il ne s'agit pas ici des fouilles effectuées à l'occasion d'une arrestation ou fondées sur des motifs raisonnables de croire à la présence de pièces à conviction sur la personne visée. Pourraient cependant tomber sous le coup de la *Charte*, par exemple, les fouilles effectuées «au hasard», dans plusieurs régions du Canada[286], en vue de découvrir des stupéfiants ou des drogues, ou le simple contrôle auquel est soumise une personne dans la rue sans son consentement, dans le seul but de vérifier si un crime n'aurait pas été commis ou si l'ordre public est menacé. Interrogé par un chercheur de la Commission, un agent de police a justifié de telles activités de surveillance à des heures tardives de la façon suivante: «Si je vois quelqu'un dans la rue à deux heures du matin, je veux en savoir plus long». Si «en savoir plus long» signifie se livrer à une fouille et à une saisie, l'article 8 pourrait avoir à cet égard un effet restrictif.

II. Conclusion

237. Nous croyons avoir démontré, dans le présent chapitre, la nécessité d'une réforme du droit des perquisitions et des saisies en droit criminel. Mais reste à savoir comment doit être effectuée cette réforme. Le présent document a donné jusqu'ici un tableau général de la situation, tout en décrivant certains aspects des procédures relatives aux mandats de perquisition. Il est indispensable, si l'on veut proposer des modifications précises, d'examiner d'une façon plus détaillée les règles sur les mandats de perquisition. La deuxième partie du présent document est principalement consacrée à cette tâche.

Renvois

1. *Code criminel*, S.R.C. 1970, chap. C-34.

2. En considérant les mandats délivrés en vertu de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1 et la *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27, comme des mandats de «droit criminel», nous ne mettons pas en question le bien-fondé de la décision rendue par la Cour suprême dans l'arrêt *La Reine* c. *Hauser*, [1979] R.C.S. 984; 46 C.C.C. (2d) 481. Notre position à cet égard est explicitée dans le texte, *supra*, par. 98.

3. *Loi sur la marine marchande du Canada*, S.R.C. 1970, chap. S-9, art. 260; *Loi canadienne sur la tempérance*, S.R.C. 1970, chap. T-5, art. 137; *Loi sur l'accise*, S.R.C. 1970, chap. E-12, art. 72; *Loi sur les criminels fugitifs*, S.R.C. 1970, chap. F-32, art. 19; *Loi sur l'exportation du gibier*, S.R.C. 1970, chap. G-1, art. 7; *Loi sur l'importation des boissons enivrantes*, S.R.C. 1970, chap. I-4, art. 7; *Loi sur les Indiens*, S.R.C. 1970, chap. I-6, par. 103(4); *Loi sur les secrets officiels*, S.R.C. 1970, chap. O-3, art. 11; *Loi sur la radio*, S.R.C. 1970, chap. R-1, art. 10.

   Dans la distinction entre les perquisitions avec mandat et les perquisitions sans mandat, la présente étude adopte une définition restrictive du mandat. Essentiellement, un document n'y est considéré comme un mandat que s'il présente tous les critères relatifs au caractère judiciaire et à la spécificité (décrits dans le présent document) qui caractérisent le mandat. Par conséquent, de nombreux documents conférant un pouvoir, par exemple les autorisations émises en vertu de l'article 134 de la *Loi sur les douanes*, S.R.C. 1970, chap. C-40, et du paragraphe 231(4) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, chap. 63, n'ont pas été inclus dans la liste ci-dessus.

4. Ces pouvoirs font l'objet d'une étude en cours à la Commission de réforme du droit sur les perquisitions à caractère réglementaire. Les données ont été compilées dans un document préliminaire et non publié: Vicki Wong, "Search and Seizure Outside the Traditional Criminal Context" (1979).

5. Patrick Fitzgerald, "The Arrest of a Motor Car", [1965] *Crim. L.R.* 23, p. 27.

6. L'affaire *Rex* v. *Ella Paint* (1917), 28 C.C.C. 171 (C.S. N.-É.), a décidé qu'un agent muni d'un mandat de perquisition avait commis des voies de fait parce qu'il avait outrepassé le pouvoir que lui conférait ce mandat en fouillant un occupant.

7. Voir par exemple *R.* v. *Richardson* (1924), 42 C.C.C. 95 (Cour du Banc du Roi de la Saskatchewan), et *R.* v. *Lauzon*, décision non publiée, rendue le 30 mars 1977 (Cour provinciale de l'Ontario).

8. *Déclaration universelle des droits de l'homme*, Résolution 217 (iii) A de l'A.G., art. 12, doc. N.-U. A/810, p. 71 (1948).

9. *Loi constitutionnelle de 1982*, art. 8 (appelée ci-après la *Charte canadienne des droits et libertés*).

10. Voir le renvoi 3, *supra*.

11. Voir la description de l'entrée des agents de police donnée dans l'affaire *Eccles* c. *Bourque*, [1975] 2 R.C.S. 739; (1974), 27 C.R.N.S. 325. Jusqu'à ce que le lecteur apprenne «le but de l'entrée dans les lieux», à savoir l'arrestation d'une personne, la description pourrait tout aussi bien s'appliquer à une perquisition.

12. *Scott* c. *La Reine* (1975), 24 C.C.C. (2d) 261, p. 263 (p. 2 de la traduction inédite des motifs du juge Thurlow).

13. *Ibid.*, p. 265 (p. 4 de la traduction). Le juge Thurlow était dissident dans cette affaire, mais les juges de la majorité (le juge Urie et le juge suppléant Smith) ont également considéré le fait comme une perquisition.

14. American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975), par. 210.1(1) (ci-après appelé le "A.L.I. Code").

15. *A.L.I. Code*, par. 210.1(2).

16. R. Thomas Farrar, "Aspects of Police Search and Seizure without Warrant in England and the United States" (1975), 29 *U. Miami L. Rev.* 491, p. 493.

17. Voir le texte, *infra*, Deuxième partie, par. 55-63.

18. *R.* c. *Whitfield*, [1970] R.C.S. 46, p. 48.

19. Il a été décidé dans l'affaire *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (Cour d'appel de l'Ontario), que les policiers peuvent donner aux occupants l'ordre de rester immobiles lors d'une perquisition effectuée pour trouver des stupéfiants.

20. *Colet* c. *La Reine*, [1981] 1 R.C.S. 2; (1981), 57 C.C.C. (2d) 105.

21. *Code criminel*, S.R.C. 1970, chap. C-34, art. 445. Voir le texte, *infra*, Deuxième partie, par. 238-244.

22. *Entick* v. *Carrington* (1765), 19 St. Tr. 1029 (C.P.).

23. La saisie d'objets considérés uniquement comme des éléments de preuve n'a pas été reconnue aux États-Unis avant *Warden, Maryland Penitentiary* v. *Hayden* (1966), 387 U.S. 294. En Grande-Bretagne, un pas important dans ce sens a été franchi par l'arrêt *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.). La "Royal Commission on Criminal Procedure", p. 34 de son Rapport, Cmnd. 8092 (1981), a recommandé de légiférer pour permettre, en certaines circonstances, la délivrance de mandats pour saisir des éléments de preuve.

24. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196, p. 200 (H.C. Ont.)

25. La Commission a fait une enquête sur les perquisitions et saisies avec mandat dans sept villes canadiennes; les données étaient fournies par les policiers eux-mêmes. Dans 90,4 pour cent des perquisitions effectuées en vertu de mandats délivrés aux termes de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* et dans 85,6 pour cent des perquisitions faites en vertu d'autres mandats, on a trouvé au moins une personne présente sur les lieux de la perquisition. Voir le renvoi 262, *infra*, pour des détails sur cette enquête.

26. Pour une intéressante étude sur le libéralisme et les droits des personnes, voir D. N. Weisstub et C. C. Gotlieb, *The Nature of Privacy*, Ottawa, Ministères des Communications et de la Justice, 1972.

27. Alan F. Westin, *Privacy and Freedom*, New York, Atheneum, 1967, p. 365.

28. Voir Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), *R. du B.C.* 1.

29. *Berger* v. *New York* (1966), 388 U.S. 41.

30. Sir William Blackstone, *Commentaries on the Law of England*, Oxford, Clarendon Press, 1769, vol. 4, p. 169.

31. *A.L.I. Code*, *supra*, renvoi 14, p. 166.

32. L'article 178.23 du *Code criminel*, S.R.C. 1970, chap. C-34, est consacré à cet objectif.

33. Voir le texte, *infra*, Deuxième partie, par. 349-373.

34. *Charte canadienne des droits et libertés*, art. 7.

35. *Déclaration canadienne des droits*, S.R.C. 1970, Appendice III, alinéa 1*a*).

36. *Charte des droits et libertés de la personne*, S.R.Q. 1977, chap. C-12, art. 1.

37. *R.* v. *Ella Paint*, *supra*, renvoi 6, p. 175.

38. Le texte actuel de l'article 101, qui vise les perquisitions en vue de trouver des armes dont une personne a la «possession, la garde ou le contrôle», autorise-t-il les fouilles de personnes? La question est controversée. Voir le texte, *infra*, Deuxième partie, par. 435.

39. Voir le texte, *supra*, par. 81, et Lee Paikin, "Standards of Reasonableness in the Law of Search and Seizure" dans Vincent M. Del Buono éd., *Canadian Criminal Procedure in Canada*, Toronto, Butterworths, 1982, p. 93 à 124.

40. À titre d'exemple d'une ancienne loi anglaise autorisant la saisie d'armes dangereuses, voir *An Act for Ordering the Forces in the Several Counties of this Kingdom*, 14 Car. 2, chap. 3, art. 13.

41. *Laporte* v. *Laganière, J.S.P.* (1972), 18 C.R.N.S. 357 (Cour d'appel du Québec), p. 369.

42. *Scott* c. *La Reine*, *supra*, renvoi 12.

43. *R.* v. *Brezack* (1949), 96 C.C.C. 97 (Cour d'appel de l'Ontario), p. 101.

44. *Reynen* v. *Antonenko* (1975), 20 C.C.C. (2d) 342 (C.S. de l'Alberta, div. de première instance).

45. *Code criminel*, S.R.C. 1970, chap. C-34, par. 237(2).

46. *Code criminel*, S.R.C. 1970, chap. C-34, alinéa 237(1)*b*), et *Proc. gén. du Québec* c. *Bégin*, [1955] R.C.S. 595; 112 C.C.C. 209.

47. Un document de travail sur les méthodes d'investigation scientifiques est actuellement en cours de préparation pour la Commission.

48. "Royal Commission into Metropolitan Police Practices", *Report*, ci-après appelé le *Morand Report*, Toronto, 1976, p. 5.

49. Albert Mayrand, *L'inviolabilité de la personne humaine*, Montréal, Wilson et Lafleur, 1975, p. 94.

50. Ces directives ont été citées, par exemple, dans le "Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May 1974", *Report* (1975) (appelé ci-après le *Pringle Report*).

51. *Entick* v. *Carrington*, *supra*, renvoi 22, p. 1066.

52. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 B.R. 299, p. 319.

53. L'idée a surtout été mise de l'avant par le théoricien du dix-huitième siècle, John Locke, dans son "Second Treatise of Government". Voir John Locke, *Two Treatises of Government*, New York, Cambridge University Press, 1960, p. 395.

54. *Charte des droits et libertés de la personne*, L.Q. 1977, chap. C-12, art. 6 et 8.

55. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (Cour provinciale de l'Ontario).

56. Voir les commentaires au paragraphe 60 du présent document.

57. Une personne peut posséder des biens-fonds aussi bien que des biens mobiliers. Le mandat conçu par Hale visait toutefois les «biens volés» ("goods") (voir *supra*, par. 71) et les tribunaux de common law ont toujours considéré que les immeubles et les objets fixés à demeure ne pouvait faire l'objet de saisie dans l'exécution d'un mandat à caractère pénal. Cette exception ne fait que refléter le bon sens, si l'on envisage la saisie comme l'acte d'enlever physiquement un objet. Toutefois il est difficile d'expliquer pourquoi dans *R.* v. *Munn*, par exemple, le tribunal a décidé qu'un ensemble de portes facilement détachables ne pouvait être saisi en vertu d'un mandat: (1938), 71 C.C.C. 139 (C. S. I.P.-É.).

58. On peut trouver des exceptions à cette règle dans le *Code criminel*, S.R.C. 1970, chap. C-34, art. 445, la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, alinéa 10(1)*c*) et la *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27, alinéa 37(1)*c*).

59. *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, par. 10(4).

60. L'Ontario et le Manitoba sont les deux provinces à avoir des dispositions d'application générale sur le "trespass" (voir *The Petty Trespass Act* (Loi sur l'intrusion), S.R.M. 1970, chap. P50 et le *Trespass to Property Act* (Loi sur l'entrée abusive), R.S.O. 1980, chap. 511. Il y a dans cinq autres provinces des dispositions interdisant certains "trespass" bien définis.

61. Burns, *supra*, renvoi 28, p. 14.

62. Paul Freund, "Privacy: One Concept or Many" (1971), 13 *Nomos* 182, p. 197.

63. Donald Madgewick, *Privacy under Attack*, Londres, Council for Civil Liberties, 1968, p. 2.

64. *Arkansas* v. *Sanders* (1979), 442 U.S. 753, p. 761.

65. Voir le texte, *infra*, Deuxième partie, par. 146-150.

66. *Silverman* v. *United States* (1961), 365 U.S. 505, p. 511.

67. *Semayne's Case* (1603), 5 Co. Rep. 91a (K.B.). Très récemment, cet arrêt a été cité dans *Colet*, *supra*, renvoi 20.

68. *Dorman* v. *United States* (1970), 435 F. 2d 385 (C.A. D.C.).

69. *Re United Distillers Ltd.* (1946), 88 C.C.C 338 (C.S. C.-B.)

70. Cette question a été soulevée par la Cour d'appel de l'Ontario mais est restée sans réponse, dans l'affaire *Re Pink Triangle Press and The Queen* (1978), 2 W.C.B. 228 (H.C. Ont.), confirmée le 2 mai 1978 (C.A. Ont.).

71. Voir le texte *supra*, par. 153-155 et 169-170.

72. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (C.A. de l'Alb.).

73. Selon l'enquête de la Commission sur les perquisitions avec mandat, la durée des perquisitions allait de une minute à sept heures; la période moyenne était de cinquante-trois minutes. Voir le renvoi 262, *infra*.

74. Timothy G. Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law*, Ontario, Commission on Freedom of Information and Individual Privacy, 1979, p. 156.

75. Voir l'opinion dissidente du juge Douglas dans l'affaire *Warden, Maryland Penitentiary* v. *Hayden*, *supra*, renvoi 23.

76. Voir le texte, *infra*, Deuxième partie, par. 339-348.

77. Voir le texte, *supra*, par. 34-37.

78. George Orwell, *Nineteen Eighty-Four*, Londres, Secker & Warburg, 1949. Pour un renvoi à ce volume dans un ouvrage reconnu qui porte sur la vie privée, voir, par exemple, John Shattuck, *Rights of Privacy*, Skokie, National Textbook Co., 1977, p. 23-24.

79. *Victoria Park Racing* v. *Taylor* (1937), 58 C.L.R. 479 (H.C. Aust.)

80. *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345.

81. Voir Brown, *supra*, renvoi 74, p. 184-189.

82. *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33, par. 52(2). La protection des renseignements personnels est prévue à l'article 8 de la *Loi sur la protection des renseignements personnels*, S.C. 1980-81-82, chap. 111, Annexe II.

83. S.C. 1980-81-82, chap. 111, Annexe II, alinéas 8(2)*c*) et *e*).

84. *Report of the Commission of Inquiry into the Confidentiality of Health Information*, Toronto, Queen's Printer for Ontario, 1980, vol. 1, p. 16.

85. Voir, par exemple, la discussion sur la divulgation des renseignements relatifs à une perquisition ou à une saisie, *infra*, Deuxième partie, par. 299-321.

86. Charles Sweet, *A Dictionary of English Law*, Londres, Henry Sweet, 1882, p. 876.

87. Voir le texte, *supra*, par. 80-83.

88. Voir J.P. Kenyon, *The Stuart Constitution, 1603-1688*, Cambridge, Cambridge University Press, 1966, p. 492-497.

89. Voir F.W. Maitland, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1908, p. 233.

90. Farrar, *supra*, renvoi 16, p. 502n.

91. Sir Matthew Hale, *History of the Pleas of the Crown*, Londres, Gyles, Woodward & Davis, 1736, vol. II, p. 113.

92. L'enquête que la Commission a effectuée sur les mandats n'a révélé aucun cas, parmi les 2 230 qui ont fait l'objet d'une réponse à la Commission, de dénonciation faite par un individu. Toutefois, la méthodologie de l'enquête avait été établie de façon à recueillir d'abord les données relatives aux fouilles, perquisitions et saisies effectuées par les policiers. Voir *infra*, renvoi 262.

93. La "Constabulary Force" de Terre-Neuve représente un exemple d'une force de police responsable devant un ministre; voir *The Constabulary Act*, R.S.N. 1970, chap. 58, art. 5. En Colombie-Britannique, les forces de police municipales sont par contrat responsables devant des commissions établies en vertu de la loi: *The Police Act*, R.S.B.C. 1979, chap. 331, art. 19. La troisième solution, celle où le conseil municipal lui-même a un droit de regard, a été adoptée au Manitoba: *The Municipal Act* (Loi sur les municipalités), S.M. 1970, chap. 100, art. 285 et 286.

94. *Re Worrall*, [1965] 2 C.C.C. 1 (C.A. Ont.), p. 5.

95. Edward Coke, *The Third Part of the Institutes of the Laws of England*, Londres, E. & R. Brooke, 1797, p. 176-177.

96. Hale, *supra*, renvoi 91, p. 150.

97. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, [1982] 1 R.C.S. 175, p. 179; (1982) 40 N.R. 181, p. 185, le juge Dickson.

98. Voir le texte, *supra*, par. 213-222.

99. J. Pollock, *The Popish Plot* (1903), cité dans Farrar, *supra*, renvoi 16, p. 552.

100. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (C.S. C.-B.), p. 489.

101. *Re Writs of Assistance*, [1965] 2 R.C. de l'É. 645, p. 651.

102. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (H.C. Ont.), p. 266.

103. Hale, *supra*, renvoi 91, p. 150.

104. Voir le texte, *supra*, par. 55.

105. Voir Paikin, "Standards of Reasonableness", *supra*, renvoi 39.

106. Voir le texte, *supra*, par. 126-128.

107. *Johnson* v. *United States* (1948), 333 U.S. 10, p. 13-14.

108. Voir le texte, *infra*, Deuxième partie, par. 35-38.

109. Voir, par exemple, John Faulkner, "Writs of Assistance in Canada" (1971), 9 *Alta. L. Rev.* 386.

110. Voir, par exemple, E.W. Trasewick, "Search Warrants and Writs of Assistance" (1962), 5 *Crim. L.Q.* 341, p. 345.

111. *An Act for Preventing Frauds and Regulating Abuses in Her Majesty's Customs*, 13 & 14 Car. 2, chap. 11, par. 5(2).

112. Une bonne partie des données factuelles présentées dans le présent document à propos du mandat de main-forte en matière douanière proviennent de l'ouvrage de M. H. Smith, *The Writs of Assistance Case*, Berkeley, University of California Press,1978.

113. *Ibid.*, p. 38-39.

114. Le calligraphe était le fonctionnaire chargé de la perception des dettes dues au Roi, un fonctionnaire de la Cour de l'Échiquier. Voir Smith, *ibid.*, p. 35.

115. Voir le renvoi 111, *supra*.

116. Voir, par exemple, *Entick* v. *Carrington*, *supra*, renvoi 22, p. 1069, et *Huckle* v. *Money* (1763), 2 Wils. K.B. 206 (K.B.), p. 206-207.

117. *Paxton's Case* (1761), publié dans Samuel M. Quincy éd., *Reports of Cases argued and adjudged in the Superior Court of the Province of Massachusetts Bay, between 1761 and 1772 by Josiah Quincy, Junior*, Boston, 1865. Dans une lettre du 29 mars 1817, Adams écrivait à William Tudor, «Là naquit l'indépendance»; voir C. F. Adams éd., *Life and Works of John Adams*, vol. 10, Boston, 1856, p. 248.

118. Voir la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, art. 10; *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27, art. 37; *Loi sur les douanes*, S.R.C. 1970, chap. C-40, art. 145; *Loi sur l'accise*, S.R.C. 1970, chap. E-12, art. 78.

119. Voir par exemple, *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (C.S. Qué.)

120. *Loi sur l'accise*, S.R.C. 1970, chap. E-12, art. 79.

121. *Re Writs of Assistance*, *supra*, renvoi 101, p. 651-652.

122. Selon les directives de manuels d'opérations récents de la G.R.C., les agents détenteurs d'un mandat de main-forte ne doivent pas l'utiliser à la demande d'un autre service de police à moins que l'agent de la G.R.C. ne soit responsable de la perquisition.

123. Faulkner, *supra*, renvoi 109, p. 393.

124. Communiqué de presse du ministère de la Justice daté du 6 avril 1978.

125. *La Reine* c. *Hauser*, *supra*, renvoi 2.

126. Notre étude ne porte pas sur les pouvoirs d'inspection à caractère

réglementaire conférés aux inspecteurs en vertu du paragraphe 22(1) de la *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27.

127. Les lois provinciales suivantes relatives aux boissons alcooliques contiennent des pouvoirs de perquisition liés aux véhicules automobiles: R.S.A. 1980, chap. 211, art. 115; R.S.B.C. 1979, chap. 237, art. 67; S.R.M. 1970, chap. L160, art. 248; L.R.N.B. 1973, chap. L-10, art. 163 et 165; S.N. 1973, chap. 103, art. 93; R.S.N.S. 1967, chap. 169, art. 126; R.S.O. 1980, chap. 244, par. 48(2); R.S.P.E.I. 1974, chap. L-17, art. 60; R.S.S. 1978, chap. L-18, art. 131.

128. Le recours à des pouvoirs provinciaux pour immobiliser des véhicules à des fins d'application du droit pénal ne semble faire l'objet d'aucune contestation. Il a été décrit aux chercheurs de la Commission par les agents de la paix de diverses forces de police à travers le Canada. Pour une étude scientifique sur cette pratique, voir Richard V. Ericson, *Reproducing Order*, Toronto, University of Toronto Press, 1982, p. 84.

129. Une bonne partie des arguments avancés ici proviennent de l'étude de Lee Paikin, "Standards of Reasonableness", *supra*, renvoi 39.

130. Voir, par exemple, Paul Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307.

131. Paul Weiler, *In the Last Resort*, Toronto, Carswell, 1974, p. 165.

132. *R.* c. *Drybones*, [1970] R.C.S. 282.

133. *Curr* c. *La Reine*, [1972] R.C.S. 889, p. 899, le juge Laskin.

133a. M. Duverger, *Constitutions et documents politiques*, 8e éd. mise à jour, Paris, P.U.F., 1978 (coll. Thémis).

134. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

135. *Payton* v. *New York* (1980), 445 U.S. 573.

136. Voir le texte, *infra*, Deuxième partie, par. 443-468.

137. *Wah Kie* v. *Cuddy (No. 2)*, *supra*, renvoi 72, et *Levitz* v. *Ryan*, *supra*, renvoi 19.

138. P. Devlin, *The Criminal Prosecution in England*, éd. rév., Londres, Oxford University Press, 1960.

139. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, p. 454-455.

140. Voir, par exemple, *Re Worrall*, *supra*, renvoi 94.

141. *R.* v. *Corrier* (1972), 7 C.C.C. (2d) 461 (Cour suprême du N.-B., division d'appel).

142. *Ghani* v. *Jones*, *supra*, renvoi 23.

143. Voir, par exemple, *Jeffrey* v. *Black*, [1978] Q.B. 490 (D.C.) et les

commentaires sur cette décision: (1978), 37 *Camb. L.J.* 200.

144. R.C.C.P., *supra*, renvoi 23, p. 33.

145. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (C.S. Alb., division d'appel), p. 301-302.

146. Sir Matthew Hale, *The History of the Pleas of the Crown*, vol. II, *supra*, renvoi 91, p. 94.

147. *An Act for more effectually discouraging and preventing the stealing, and the buying, and receiving of stolen lead, iron, copper, brass, dell-metal, and solder, and for more effectually bringing the offenders to justice*, 29 Geo. 2, chap. 30, art. 3.

148. *R.* v. *O'Donnell* (1835), 7 Car. & P. 138; 173 E.R. 61 (N.P.).

149. *Bessell* v. *Wilson* (1853), 20 L.T.O.S. 233 (Q.B.).

150. *Leigh* v. *Cole* (1853), 6 Cox, C.C. 329, p. 332.

151. *Corpus Juris*, Vol. 5, New York, American Law Book Co., 1916 p. 434.

152. *Gottschalk* v. *Hutton*, *supra*, renvoi 145; *Reynen* v. *Antonenko*, *supra*, renvoi 44.

153. *R.* v. *Brezack*, *supra*, renvoi 43, p. 75.

154. *R.* v. *Whitfield*, *supra*, renvoi 18.

155. *Règlement sur le service des pénitenciers*, C.R.C. 1978, chap. 1251, par. 41(2), modifié par DORS/80-462.

156. *Reynen* v. *Antonenko*, *supra*, renvoi 44, p. 348-349.

157. *R.* v. *McDonald*; *R.* v. *Hunter* (1932), 59 C.C.C. 56 (C.S. Alb., division d'appel).

158. *Rapport du Comité canadien de la réforme pénale et correctionnelle*, Ottawa, Information Canada, 1969, p. 66 (appelé ci-après le «Rapport Ouimet»).

159. La G.R.C. a elle-même proposé, dans ses manuels d'opérations, une interprétation des règles en vigueur. Selon une directive récente, le pouvoir de fouiller les lieux qui sont sous le contrôle de la personne est restreint aux lieux qui sont dans l'entourage immédiat de cette personne, c'est-à-dire la pièce dans laquelle elle est arrêtée.

160. *Jeffrey* v. *Black*, *supra*, renvoi 143.

161. Voir le texte, *supra*, par. 118.

162. *R.* v. *McDonald*, *supra*, renvoi 157.

163. *Smith* v. *Baker*, [1891] A.C. 325 (C.L.), p. 360.

164. La Cour d'appel de l'Ontario, par exemple, a adopté cette conception

dans une décision récente, *R.* v. *Dedman* (1981), 32 O.R. (2d) 641, qui ne portait cependant pas spécifiquement sur une fouille «de consentement». L'automobiliste avait immobilisé son véhicule sur le geste d'un policier. Pour la Cour, il s'agissait d'un acte volontaire: l'agent de la paix, par son geste, n'avait pas eu recours aux pouvoirs coercitifs de la police, mais avait exercé son droit de faire un acte qui ne portait pas atteinte aux droits de l'automobiliste en lui demandant de se conformer à sa volonté.

165. *Reynen* v. *Antonenko*, *supra*, renvoi 44.

166. Rapport Ouimet, *supra*, renvoi 158, p. 59.

167. *Thomas* v. *Sawkins*, [1935] 2 K.B. 249 (C.A.).

168. *Carpenter* v. *McDonald* (1978), 4 C.R. (3d) 311 (Cour de district de l'Ontario).

169. Elisabeth Scarff, Ted Zaharchuck, Terrence Jacques et Michael McAuley, *Evaluation des mesures législatives canadiennes relatives au contrôle des armes à feu: Premier rapport provisoire*, Ottawa, Approvisionnements et Services, 1981, p. 123.

170. *Entick* v. *Carrington*, *supra*, renvoi 22.

171. Voir Maitland, *supra*, renvoi 89, p. 302.

172. Ainsi, la première disposition légale sur un mandat de perquisition visant la saisie d'armes se trouve dans une loi qui porte sur la sécurité nationale en général et qui contient notamment des dispositions relatives à l'entraînement et à l'approvisionnement des troupes, aux enquêtes touchant à la violation des obligations militaires et à la punition des coupables. Voir 14 Car. II, chap. 3, art. 13.

173. Charles Hilchin, *A True Discovery of the Conduct of Receivers and Thief Takers in and about the City of London* ... (1718), p. 7.

174. Même si le mélange pouvait être aussi hétéroclite, il existait, toutefois, une tendance, dans les lois pré-confédératives, à conférer des pouvoirs de portée plus générale que les pouvoirs restreints des textes anglais dont elles s'inspiraient. Au Canada, par exemple, un juge de paix provincial pouvait, contrairement à son homologue britannique, délivrer un mandat «pour une chose quelconque pour ou à raison de laquelle une offense a été commise»: S.C.C. 1859, chap. 99, art. 2. La Confédération, en obligeant le gouvernement central à assembler les diverses règles de procédure criminelle des provinces, apporta un certain encouragement aux efforts de codification, même si cette tendance se produisit malgré la préférence avouée des parlementaires canadiens pour la méthode anglaise de compartimentation. Sir John A. Macdonald, présentant, à la première session du Parlement, divers projets de loi relatifs au droit criminel, déclarait qu'il préférait «présenter des bills distincts au lieu d'un code,

parce que, au cas où un statut particulier serait sensiblement modifié, il serait plus commode de l'abroger en entier et de le promulguer à nouveau que de procéder d'une façon fragmentaire. En conformité avec la méthode anglaise, il [avait] donc fait préparer des projets de loi distincts». Voir *Débats de la Chambre de communes*, 1867-68 (première session), p. 442 (le 1er avril 1868).

175. Des dispositions relatives aux mandats de perquisition se trouvent dans les lois suivantes: *Betting, Gaming and Lotteries Act, 1963*, (R.-U.) 1963, chap. 2, art. 51; *Coinage Offences Act, 1936*, 26 Geo. 5 et 1 Edw. 8, chap. 16, par. 11(3) (R.-U.); *Firearms Act, 1968*, (R.-U.), 1968, chap. 27, art. 46; *Obscene Publications Act, 1959*, 7 et 8 Eliz. 2, chap. 66, art. 3 (R.-U.); *Sexual Offences Act, 1956* 4 et 5 Eliz. 2, chap. 69, art. 43 (R.-U.); *Theft Act, 1968* (R.-U.), 1968, chap. 60, art. 26.

Le pouvoir de délivrer un mandat de perquisition pour obtenir des éléments de preuve serait quelque peu généralisé selon les recommandations de la "Royal Commission on Criminal Procedure" dans son Rapport, *supra*, renvoi 23. Voir également l'étude préliminaire effectuée par la R.C.C.P., *The Investigation and Prosecution of Criminal Offences in England and Wales*, Cmnd. 8092-1 (1981), p. 108-118.

176. Voir le texte, *supra*, par. 132-133.

177. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (Cour divisionnaire de l'Ontario), p. 521.

178. *Re R. and Johnson & Franklin Wholesale Distributors* (1971), 3 C.C.C. (2d) 484 (C.A. C.-B.), p. 489.

179. Hale, *supra*, renvoi 91, p. 113-114; *Fanning* v. *Gough* (1908), 18 C.C.C. 66 (Cour suprême de l'Î.P.-É. en séance plénière). Voir *infra*, Deuxième partie, par. 220-224.

180. Hale, *ibid.*, p. 150.

181. *R.* v. *Execu-Clean Ltd.*, (jugement inédit de la Haute Cour de justice de l'Ontario, en date du 30 janvier 1980).

182. *Débats de la Chambre des communes*, 1953-54, vol. III, première session, vingt-deuxième législature, p. 2663 (le 26 février 1954) et p. 2992 (le 9 mars 1954).

183. *Norland Denture Clinics Ltd.* v. *Carter* (1968), 5 C.R.N.S. 93 (B.R. Sask.).

184. *Loi d'interprétation*, S.R.C. 1970, chap. I-23, par. 27(2).

185. Voir, par exemple, *Re Abou-Assale* c. *Bourdon*, [1978] C.S. 142; 39 C.C.C. (2d) 546 (sous le titre *Re Abou-Assale and Pollack and The Queen*); pour une opinion contraire, voir *Re McAvoy* (1970), 12 C.R.N.S. 56 (C. des T.N.-O.)

186. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (C.A. Ont.).

187. Leon Radzinowicz, *A History of English Criminal Law*, Londres, Stevens and Sons, 1956, vol. II, p. 3.

188. *An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds and other idle and disorderly Persons, and to Houses of Correction*, 17 Geo 2, chap. 5, art. 6; *An Act for the better preventing Thefts and Robberies, and for regulating Places of Publick Entertainment, and punishing Persons Keeping disorderly Houses*, 25 Geo 2, chap. 36, art. 12.

189. *Acte relatif aux vagabonds*, S.C. 1869, chap. 28, art. 2.

190. *Acte pour supprimer les maisons de jeu, et pour punir ceux qui les tiennent*, S.C. 1875, chap. 41, art. 1.

191. *Gaming House Act*, 17 & 18 Vict., chap. 38, art. 5.

192. Le Parlement est saisi du projet de loi C-53, 1980-81, qui renferme des propositions visant à modifier le *Code criminel* à l'égard des infractions sexuelles. L'article 11 de la loi proposée abrogerait l'article 183. Comme ces dispositions n'ont pas encore été adoptées, la présente étude considère l'article 183 comme le droit actuel. [Note de l'éditeur, l'article 11 du projet de loi C-53 a été adopté par la Chambre des Communes. Voir S.C. 1980-81-82, chap. 125, art. 12]

193. *Metropolitan Police Courts Act*, 2 & 3 Vict., chap. 71, art. 48.

194. *Gaming Act*, 8 & 9 Vict., chap. 109, art. 6.

195. Voir *Débats de la Chambre des communes*, 1953-54, vol. III, première session, vingt-deuxième législature, p. 2551-55 (le 24 février 1954). L'article 81 actuel fut approuvé en comité sans débat.

196. *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, [1964] 3 C.C.C. 82 (C.S. C.-B.)

197. *R.* v. *Chew* (1964), 44 C.R. 145 (Cour suprême de l'Ontario), p. 149.

198. Comme l'explique le renvoi 192, *supra*, le Parlement est saisi du projet de loi relatif aux infractions sexuelles. L'article 182 serait abrogé par l'article 11 du projet. [Note de l'éditeur: voir S.C. 1980-81-82, chap. 125, art. 12]

199. Voir Vern et Bonnie Bullough, *Prostitution: An Illustrated Social History*, New York, Crown Publishers, 1978, p. 241-253.

200. Il est historiquement reconnu que la législation visant à combattre l'exploitation était reliée à des interdictions de caractère purement victorien, dirigées contre l'homosexualité et les activités sexuelles entre mineurs. Lorsque le Canada, en 1886, voulut s'inspirer du modèle britannique, ces dispositions contre l'exploitation continuèrent d'être basées aussi sur ces mêmes interdictions. Voir *Acte*

concernant les crimes contre les mœurs et la tranquillité publiques, S.R.C. 1886, chap. 157.

201. Cette affirmation trouve effectivement un appui dans le titre donné à l'article 183 du *Code*: «Interrogatoire des personnes arrêtées dans des maisons de débauche». Voir *Martin's Annual Criminal Code 1981*, Aurora, Canada Law Book Ltd., 1981, p. 185.

202. Tous les renvois à la législation sur les stupéfiants sont, sauf indication contraire, des renvois à la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1.

203. Bruce A. MacFarlane, *Drug Offences in Canada*, Toronto, Canada Law Book, 1979, p. 19-28.

204. Emily Murphy (sous le pseudonyme de «Janey Canuck»), *The Black Candle*, Toronto, Thomas Allen,1922, p. 332-333. Voir MacFarlane, *supra*, renvoi 203, p. 23-24, pour le contexte historique de la polémique du juge Murphy.

205. *Débats de la Chambre des communes*, 1953-54, vol. V, première session, vingt-deuxième législature, p. 5624 (le 1er juin 1954).

206. *Loi de l'opium et des drogues*, S.C. 1911, chap. 17, art. 7.

207. *Loi de l'opium et des drogues narcotiques*, S.C. 1923, chap. 22, art. 18.

208. *Loi de l'opium et des drogues narcotiques*, S.C. 1929, chap. 49, art. 22.

209. *Loi modifiant la Loi des aliments et drogues*, S.C. 1960-61, chap. 37, art. 1 et 36.

210. Voir, par exemple, *Re R. and Kellet* (1973), 14 C.C.C. (2d) 4 (C.A. Ont.)

211. *R.* v. *Jaagusta*, [1974] 3 W.W.R. 766.

212. *Ibid.*, p. 768.

213. Voir, par exemple, *R.* v. *Erikson* (1978), 39 C.C.C. (2d) 447 (Cour de district de l'Ontario).

214. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (C. prov. Ont.)

215. Pour une discussion sur l'obscénité, voir le document d'étude de la Commission de réforme du droit du Canada sur *L'Obscénité* (décembre 1972), p. 90. (Copie disponible à la bibliothèque de la Commission.)

216. *Débats de la Chambre des communes*, 1959, vol. V, deuxième session, vingt-quatrième législature, p. 5815 (le 6 juillet 1959).

217. *Ibid.*

218. *Obscene Publications Act*, 7 & 8 Eliz. II, chap. 66, art. 3. La disposition législative antérieure figure à 20 et 21 Vict., chap. 83, art. 1.

219. Voir renvoi 216, *supra*, p. 5548.

220. *Rapport du Comité spécial de la propagande haineuse au Canada*, Ottawa, Imprimeur de la Reine, 1966, p. 12.

221. *Ibid.*, p. 73.

222. Voir par exemple, la *Loi concernant la saisie des armes gardées dans un but dangereux*, S.R.C. 1886, chap. 149, art. 2. Une exception à l'exigence d'un mandat existait cependant dans le cas de fouilles pour chercher des armes dans des réunions publiques. Voir *Code criminel, 1892*, S.C. 1892, chap. 29, art. 113.

223. *Débats de la Chambre des communes* 1912-1913, vol. V, deuxième session, douzième législature, p. 13058 (le 16 mai 1913).

224. *Code criminel*, S.C. 1953-54, chap. 51, art. 96.

225. *Code criminel*, S.R.C. 1970, chap. C-34, par. 99(2).

226. Voir le *A.L.I. Code*, *supra*, renvoi 14, alinéa 110.2(1)*a*).

227. Martin L. Friedland, "Gun Control: The Options" (1975-76), 18 *Crim. Law Q.* 29.

228. *Loi modifiant le Code criminel*, S.C. 1938, chap. 44, art. 9.

229. *Premier rapport provisoire*, *supra*, renvoi 169, p. 127-128.

230. *Loi de 1968-69 modifiant le droit pénal*, S.C. 1968-69, chap. 38, art. 6. La disposition relative aux mandats de perquisition, insérée comme l'article 98G dans cette loi, est devenue l'article 105 dans la refonte de 1970 du *Code criminel*.

231. Voir les *Procès-verbaux du Comité permanent de la Justice et des questions juridiques*, première session, vingt-huitième législature, le 6 mars 1969, p. 206.

232. *R.* c. *Colet*, *supra*, renvoi 20.

233. Voir, par exemple, la déposition du Solliciteur général de l'époque, Warren Allmand: *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, première session, trentième législature, le 27 avril 1976, p. 39:50.

234. Voir le texte, *infra*, Deuxième partie, par. 423. Certaines forces de police estiment que l'article 101 ne permet pas la fouille d'un individu. Cette interprétation qui dénote une autolimitation louable au pouvoir policier ne semble pas compatible avec le texte de l'article, qui fait référence au droit de saisir des armes «en possession, sous la garde ou sous le contrôle» de cette personne.

235. *Acte concernant le Larcin*, S.C. 1869, chap. 21, art. 30-33.

236. *Acte relatif aux marques apposées sur les bois de construction*, S.C. 1870, chap. 36.

237. *Code criminel, 1892*, S.C. 1892, chap. 29, art. 572.

238. *An Act for the more effectual Prevention of Cruelty to Animals*, 12 & 13 Vict., chap. 42.

239. *Acte concernant la cruauté envers les Animaux*, S.C. 1869, chap. 27.

240. *Débats de la Chambre des communes*, 1925, vol. IV, quatrième session, quatorzième législature, le 8 juin 1925, p. 4004.

241. Rapport de la Commission de réforme du droit du Canada, *Notre droit pénal*, Ottawa, Approvisionnement et Services, 1976, p. 37.

242. *Re Goodbaum and the Queen*, *supra*, renvoi 186.

243. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (C.S. Î.-P.-E.)

244. Voir le renvoi 262, *infra*.

245. Les problèmes relatifs aux fonds déposés à des établissements financiers sont étudiés, *infra*, Deuxième partie, par. 62-63.

246. Les problèmes touchant les renseignements informatisés dans le contexte du vol ne sont pas étudiés de façon spécifique dans le présent document. Les recommandations 1 et 2 (Deuxième partie) autoriseraient cependant la saisie de renseignements constituant «le produit d'une infraction».

247. Commission de réforme du droit du Canada, *Le vol et la fraude* [Document de travail 19], Ottawa, Approvisionnements et Services, 1977, p. 37-48.

248. La *Loi de 1975 modifiant le droit criminel*, S.C. 1974-75-76, chap. 93 a élargi l'article 312 du *Code criminel* actuel, R.S.C. 1970, chap. C-34, pour inclure «un bien ... ou [son] produit» obtenus en contravention de ses dispositions.

249. La Commission de réforme du droit du Canada a recommandé d'examiner de près les infractions relatives au jeu. Voir *Notre droit pénal*, *supra*, renvoi 241, p. 35.

250. R.C.C.P., *Report*, *supra*, renvoi 23, p. 34.

251. Inspecteur J.W. Cooley, "The Social Aspects of Crime Prevention" (1978), 2 *Can. Police C.J.* 382, p. 386.

252. Voir le texte, *supra*, par. 83.

253. Voir le *Premier rapport provisoire*, *supra*, renvoi 169, p. 130.

254. *R.* c. *Colet*, *supra*, renvoi 20.

255. Richard V. Ericson, *Making Crime: A Study of Detective Work*, Toronto, Butterworths, 1981, p. 148.

256. Voir le texte, *infra*, par. 229-232.

257. Dans le cadre de son programme d'études empiriques, la Commission a étudié l'emploi du mandat de main-forte pendant une période de quatre mois dans sept villes canadiennes: Edmonton, Montréal, Toronto, Winnipeg et Vancouver (où le mandat de main-forte a été utilisé) ainsi que Fredericton et St-Jean (où l'on n'a signalé aucune utilisation de ce mandat). L'étude sur les mandats de main-forte sera publiée séparément. Les chiffres relatifs à l'«urgence» dans le texte comprennent en réalité quatre catégories de réponses apportées à un questionnaire rempli par les utilisateurs de mandats de main-forte. Voici quelles étaient ces catégories: «urgence non précisée» (32,7 pour cent), «urgence, afin d'empêcher la destruction ou le déplacement d'éléments de preuve» (40 pour cent), «urgence — sécurité de la police dans une situation de danger» (0,6 pour cent) et «urgence, en vue d'empêcher l'effet nocif de drogues ou de boissons alcooliques contaminés» (0,6 pour cent). Étaient visés les mandats de main-forte délivrés en vertu de la *Loi sur les douanes*, S.R.C. 1970, chap. C-40, de la *Loi sur l'accise*, S.R.C. 1970, chap. E-12, ainsi que des lois relatives aux stupéfiants et aux drogues.

258. *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, première session, trente-deuxième législature, le 26 novembre 1981, p. 56:25.

259. Voir *Eccles* c. *Bourque*, *supra*, renvoi 11. La Cour suprême du Canada est de nouveau saisie de la question de l'entrée dans un lieu pour effectuer une arrestation dans l'affaire *R.* v. *Landry* (1981), 63 C.C.C (2d) 289 (C.A. Ont.).

260. Voir le renvoi 257, *supra*.

261. Voir le texte, *supra*, par. 83.

262. La stratégie, la méthodologie et les résultats de l'enquête ont été présentés dans des documents de consultation préparés pour chacune des sept villes en cause. Un compte rendu de l'enquête dans son ensemble est actuellement en cours de préparation. Chaque étude a duré quatre mois et visait à réunir, pour chaque opération, l'ensemble des mandats de perquisition délivrés pendant la durée de l'enquête, des demandes écrites, des dénonciations ou des rapports préparés en vue de l'obtention du mandat. Elle a permis aussi d'obtenir des réponses à un questionnaire rempli par l'agent de police exécutant le mandat. En tout, 2 219 cas de délivrance de mandat furent relevés. De ce nombre, 1 869 mandats furent effectivement exécutés. 1 245 des mandats *exécutés* avaient été délivrés en vertu de l'article 443, 91 en vertu de l'article 181 et 479 en vertu des dispositions de la *Loi sur les*

stupéfiants et de la *Loi des aliments et drogues*; le reste avait été délivré en vertu d'autres dispositions et d'autres lois, par exemple, la *Loi sur les douanes*.

Une fois le sondage complété, ces documents furent soumis à deux types d'analyse. Tout d'abord, la Commission a étudié avec l'aide d'un ordinateur les données provenant des documents reliés à l'obtention du mandat et les questionnaires. Cette analyse était surtout centrée sur l'exécution de la perquisition. Elle incluait l'évaluation des renseignements portant sur la personne qui l'avait effectuée, l'heure de la perquisition, son étendue et la nature des objets saisis. Un échantillon aléatoire stratifié de 236 groupes de documents parmi l'ensemble des 2 219 cas fut ensuite sélectionné et soumis à un groupe de juges de diverses cours supérieures et cours d'appel à travers le Canada. Chaque juge devait apprécier la légalité de ces documents et discuter ensuite des conclusions auxquelles il était arrivé avec les autres juges lors d'une conférence organisée par la Commission.

263. Lorsque des documents incomplets ou en partie illisibles ont donné lieu à des évaluations «inconnues», cela ne veut pas nécessairement dire que les documents soumis à l'origine à la personne qui a délivré le mandat étaient défectueux. Ces problèmes ont pu survenir au stade de la reproduction ou du rassemblement des données pour les recherchistes de la Commission. C'est pourquoi les demandes ou les mandats en question ne pouvaient être jugés invalides simplement en raison de leur caractère incomplet ou de leur illisibilité. Si les documents ne comportaient aucun autre vice et s'il semblait pour cette raison impossible de les évaluer d'une façon certaine, il leur était donné une évaluation «inconnue».

264. Voir le texte, *infra*, Deuxième partie, par. 225-226.

265. Voir le texte, *supra*, par. 74-77.

266. À cause d'une documentation incomplète, 2 pour cent des 250 ensembles de document étudiés par notre comité de juges n'ont pu être évalués d'une manière concluante.

267. Le texte de l'article 181 ne semblant pas exiger qu'un mandat délivré aux termes de cette disposition précise les objets devant être saisis, on n'a pas essayé de voir si les objets saisis correspondaient aux objets désignés sur le mandat. Tous les cas de saisies effectuées avec des mandats délivrés en vertu de l'article 181 ont été assimilés, pour les fins de ce tableau, aux cas où les objets saisis étaient désignés sur le mandat.

268. Pour chaque saisie d'objets non désignés, il y eut 2,4 saisies d'objets désignés dans le cas des mandats valides et 2 saisies dans le cas des mandats invalides.

269. Les échantillons reçus des villes de Fredericton et de Saint-Jean étant petits, il ne convient pas de présenter les chiffres relatifs à ces villes d'une façon distincte. Sur onze mandats délivrés dans ces deux villes, trois (27 pour cent) étaient valides.

270. Voir *infra*, Deuxième partie, par. 174.

271. Richard Ericson, *Making Crime*, *supra*, renvoi 255, p. 153-154. S'il est mentionné (*ibid.*, p. 232) que certains actes apparemment offensifs de la police auraient été en fait, plus des plaisanteries dirigées contre le recherchiste, la chose n'apparaît pas exacte dans le cas des deux instances précitées.

272. David Humphrey, "Abuse of Their Powers by the Police", dans Law Society of Upper Canada, Special Lectures, 1979, *The Abuse of Power and the Role of an Independant Judicial System in its Regulation and Control*, Toronto, Richard de Boo Ltd., 1979, p. 565-566.

273. Le mandat était décrit comme un «mandat concernant un crime économique» s'il était soit i) relié à la fraude, à une offre de commission secrète (article 383 du *Code criminel*, S.R.C. 1970, chap. C-34, art. 383) ou à un complot en vue de commettre l'une ou l'autre de ces infractions, soit (ii) obtenu par l'escouade des crimes économiques d'un corps policier. À Vancouver, seize mandats ont été ainsi désignés et parmi eux onze (69 pour cent) ont été jugés valides par le comité des juges.

274. *Le procureur général de la Nouvelle-Écosse c. MacIntyre*, *supra*, renvoi 97.

275. Voir J. Goldstein, "Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice" (1959-60), 69 *Yale Law Journal* 543, et Ericson, *Making Crime*, *supra*, renvoi 255, p. 11.

276. Ericson, *Reproducing Order*, *supra*, renvoi 128, p. 148.

277. Richard V. Ericson et Patricia M. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process*, Toronto, University of Toronto Press, 1982, p. 46-49.

278. Voir le texte, *supra*, par. 208.

279. Ericson, *Making Crime*, *supra*, renvoi 255, p. 148.

280. Cette enquête a été intégrée à la cueillette et à l'étude des documents dans l'enquête sur les mandats. Voir le renvoi 262, *supra*.

281. Voir le texte, *supra*, par. 101-109.

282. Voir le texte, *supra*, par. 160.

283. Voir le texte, *infra*, Deuxième partie, par. 246.

284. Voir le texte, *supra*, par. 112.

285. Voir le texte, *supra*, par. 215.

286. Voir, par exemple, la discussion sur les fouilles effectuées au hasard à Edmonton dans "Illegality of Random Searches", Peter K. MacWilliams (1979), 27 *Chitty's Law Journal* 199.

DEUXIÈME PARTIE:

L'ÉLABORATION

D'UN NOUVEAU RÉGIME

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CHAPITRE QUATRE

Comment aborder la réforme?

I. Les limites de la réforme

1. Le présent document de travail porte sur la réforme des règles de droit régissant les pouvoirs de fouille, de perquisition et de saisie en matière criminelle. Ce thème soulève d'emblée certaines limites que nous devons nous résoudre à accepter. Parmi celles-ci se trouve la question des compétences législatives: comme nous l'avons vu, l'application du droit pénal par les agents de la paix repose sur les lois provinciales aussi bien que sur les lois fédérales[1]. En outre, les relations entre les règles de procédure et l'application pratique du droit pénal imposent d'autres contraintes à notre tâche. En effet, force nous est de reconnaître que dans une certaine mesure, la procédure pénale doit être assez souple pour s'adapter aux diverses influences qu'exercent les institutions responsables de l'application du droit pénal dans les diverses régions du pays. Enfin, il nous faut aussi tenir compte des limites intrinsèques de la réforme du droit en tant que solution aux problèmes des méthodes de la police.

A. Les influences antagoniques

2. Les règles de la procédure pénale visent, entre autres, à uniformiser les pratiques qu'elles régissent. Dans un régime donné, l'importance que l'on attache à l'uniformisation se mesure au degré de détail que présentent ces règles. Sans doute serait-il possible d'élaborer un ensemble de règles régissant les pouvoirs de fouille, de

perquisition et de saisie en matière criminelle qui soit d'une telle exhaustivité qu'une fois mises en application, même les petits caractères des procès-verbaux de saisie seraient uniformes de Halifax à Vancouver. Nous ne croyons pas qu'une telle approche soit souhaitable, dans la mesure où cela reviendrait à nier l'existence de l'influence légitime qu'exercent sur l'application du droit les institutions des diverses régions du Canada.

3. Au Canada, la police relève des niveaux d'administration fédéral, provincial et municipal. Cet état de choses reflète la complexité du système d'attribution des compétences prévu par la Constitution. D'une part, l'application de la loi à l'intérieur de chaque province a toujours été considérée principalement comme faisant partie de «l'administration de la justice», domaine qui, aux termes du paragraphe 92(14) de la *Loi constitutionnelle de 1867* relève de la compétence législative des provinces. C'est pourquoi:

> chaque province a donc édicté des lois confiant ces fonctions aux autorités locales, notamment aux conseils municipaux. Des forces de police provinciales et municipales ont été constituées. Parfois les services nécessaires ont été obtenus par voie de contrat conclu avec la force de police provinciale (s'il en existe une) ou la G.R.C.[2]

Outre leur compétence décisionnelle en matière de police, c'est aux provinces qu'il appartient, en vertu des dispositions du paragraphe 92(14), d'organiser le système à l'intérieur duquel des fonctionnaires, investis des fonctions de juge de paix, délivrent les mandats de perquisition[3].

4. D'autre part, il nous faut tenir compte du rôle que joue la Gendarmerie royale du Canada. En plus de fournir des services de police à titre contractuel dans certaines provinces, la G.R.C. assume certaines responsabilités à caractère national. Au nombre de celles-ci figurent l'application des lois fédérales autres que le *Code criminel*, la police dans les Territoires du Nord-Ouest et le Yukon, ainsi que la protection de la sécurité nationale*. Sur le plan constitutionnel, il est généralement admis que ce rôle se justifie au regard de la compétence attribuée au Parlement par les dispositions de l'article 91 de la *Loi constitutionnelle de 1867* pour ce qui est de «la paix, l'ordre et le bon gouvernement du Canada».

5. Cette multiplicité des niveaux et des structures de la police se traduit par des disparités dans les pouvoirs des membres des

* Depuis la rédaction de ce texte, le projet de loi C-157, modifiant sensiblement le rôle de la G.R.C. en matière de sécurité nationale, a été introduit devant le Parlement.

diverses forces de police, ainsi que dans l'application pratique et l'orientation de ces pouvoirs. Ces disparités peuvent à leur tour avoir une incidence sur les méthodes de fouille, de perquisition et de saisie utilisées par une force policière donnée. Par exemple, on a toujours attribué à la Gendarmerie royale du Canada une habilité particulière à se charger des crimes économiques de grande envergure et ne comportant pas de violence, c'est-à-dire un domaine où l'on a souvent recours à la saisie de documents. En revanche, le rôle des membres des petites forces locales se résume souvent à des fonctions de surveillance, c'est-à-dire à assurer, au moyen de patrouilles, le maintien de l'ordre parmi les citoyens se trouvant dans leur ressort[4]. Même lorsque les agents de la G.R.C. se livrent à des fonctions semblables, on leur reconnaît volontiers des méthodes plus raffinées et mieux structurées que celles des policiers municipaux[5].

6. À la complexité des structures de la police s'ajoutent d'autres variables liées aux régions et aux communautés du Canada où s'appliquent le droit et la procédure pénale. Les dimensions, l'histoire et la composition démographique d'une communauté desservie par une force policière donnée, de même que l'activité criminelle qui lui est propre ont des effets importants sur les modalités de l'application de la loi dans cette communauté. Ainsi, relativement à la taille d'une communauté, le "Task Force on Policing" de l'Ontario a signalé dans son rapport que si l'on constate un manque de communication entre les policiers et les citoyens des grands centres urbains, en revanche, dans les petites communautés, on arrive à maintenir des liens beaucoup plus étroits et personnels[6]. La nature de ces rapports détermine la mesure dans laquelle les policiers se sentent tenus de recourir à des pouvoirs officiels, plutôt qu'à des méthodes plus informelles. Les membres de diverses forces de police canadiennes que les recherchistes de la Commission ont rencontrés se sont dits d'avis que les possibilités de coopération entre les citoyens et les policiers étaient plus grandes dans les régions rurales.

7. L'élaboration de règles portant sur les fouilles, les perquisitions et les saisies comporte la tâche délicate d'atteindre le niveau approprié d'uniformisation. Loin de nous l'intention de nier qu'il est important que la police réponde de ses méthodes et de ses politiques d'application de la loi, mais si nous faisons preuve de circonspection à cet égard, c'est que nous estimons que les institutions et les municipalités sont tout aussi à même de sanctionner cette responsabilité qu'un système de règles de procédure imposé par le Parlement. Malgré ces réserves, cette position suppose que la

modification ou l'imposition de règles de droit est importante dans la définition des pratiques de la police. Examinons cette question d'un peu plus près.

B. La pratique actuelle au regard des règles de droit

8. De nos jours, on ne s'étonne plus d'entendre dire que dans la pratique, l'application de la loi n'est pas toujours conforme aux règles de droit. Dans le contexte actuel des pouvoirs de fouille, de perquisition et de saisie, nous avons déjà fait mention des études empiriques qui démontrent l'existence de dérogations marquées par rapport aux normes établies pour les mandats[7], et nous avons reconnu qu'il était difficile de contrôler les pouvoirs de fouille, de perquisition et de saisie sans mandat[8]. Il est donc permis de se demander dans quelle mesure la réforme des règles du droit peut constituer une solution efficace aux problèmes actuels. Avant d'aborder cette question, il serait bon d'examiner certains aspects des rapports entre les pouvoirs et les pratiques de la police.

9. En droit anglo-canadien, les règles définissant les pouvoirs de la police ont toujours eu un rôle particulier: elles créent des exceptions aux principes interdisant les atteintes à la personne, à la vie privée et aux biens des citoyens[9]. Si crucial que soit ce rôle, il demeure, d'un certain point de vue, bien modeste. De toute son histoire, notre droit n'a jamais eu pour objet d'établir des mécanismes d'application permissifs, ni de définir les situations justifiant d'emblée la violation des droits fondamentaux des citoyens. Bien au contraire, le droit détermine les cas où une transgression *peut* être justifiée, en exigeant que lorsqu'une personne chargée de l'application de la loi décide de porter atteinte aux droits d'autrui, afin de poursuivre une enquête, elle justifie cette atteinte, obtienne l'autorisation nécessaire et respecte les limites fixées par la loi dans ce cas.

10. Aussi les sociologues ont-ils observé que les règles de droit prennent un rôle secondaire et ne servent qu'à sanctionner les pouvoirs des agents de la paix:

> [TRADUCTION]
> En théorie, l'application du droit pénal est censée être régie par le principe de la suprématie du droit et le principe de la légalité ....
>
> En pratique cependant, le texte législatif devient l'outil dont se servent les personnes chargées de l'application de la loi pour accomplir

> leur tâche. À cet égard, la loi leur confère des pouvoirs très étendus puisqu'elle est justement conçue en vue de l'usage pragmatique par les personnes chargées de l'application de la loi. Elle leur permet ainsi d'accomplir leur tâche de répression de la criminalité conformément aux intérêts de leur système[10].

Que les personnes chargées de l'application de la loi «se servent» des textes de loi pour accomplir leur tâche, cela n'a rien d'alarmant en soi. Bien au contraire, dans la mesure où la loi qui «sert» les policiers exerce un certain contrôle sur l'ingérence dans la vie privée des citoyens, le système s'inscrit parfaitement dans la tradition du principe de la suprématie du droit. Cependant, des problèmes surgissent à partir du moment où le droit cesse d'exercer ce contrôle et devient un ensemble de règles à valeur purement symbolique.

11. Plusieurs facteurs interviennent pour neutraliser le contrôle que la procédure devrait en principe exercer. Dans le cas des pouvoirs sans mandat, notamment, l'application des règles de droit est confiée à des personnes qui, dans l'accomplissement de leurs tâches à caractère décisionnel, ne peuvent, en toute logique, faire abstraction de leur expérience et de leur participation aux enquêtes. Les agents de la paix procèdent souvent par instinct, ce qui échappe à tout critère rationnel. Pourtant, en théorie, la décision de faire intrusion dans la vie privée des citoyens est censée être fondée sur des critères légaux souvent complexes.

12. Un autre problème réside dans les ambiguïtés et les conflits que peut présenter une situation réelle à laquelle les règles de droit doivent être appliquées. Qu'un mandat ait été délivré ou non, il est souvent difficile de savoir avec certitude si les motifs qui sont à la base de la décision du policier étaient bien fondés, et si celui-ci a agi conformément à la loi. M. Herman Goldstein a d'ailleurs fait le commentaire suivant:

> [TRADUCTION]
> Il est bien reconnu que des citoyens par ailleurs tout à fait honnêtes mentent parfois lorsqu'ils sont aux prises avec la police. Il est également clair que certains policiers masquent parfois la vérité pour justifier leur conduite. La découverte de la vérité devient une tâche d'autant plus ardue que les policiers ont souvent affaire à des individus dont le sens moral est fort douteux. En effet, le criminel invétéré n'hésite jamais à faire une fausse déclaration si cela peut aider à couvrir sa culpabilité[11].

Lorsque, dans une situation donnée, l'ambiguïté ou le conflit tient à l'application des pouvoirs de la police, il devient difficile de vérifier la légalité de l'exercice de ces pouvoirs.

13. En pratique, surtout lors d'une fouille, d'une perquisition ou d'une saisie effectuée dans le cadre d'une enquête, les agents de la paix ont un contrôle considérable sur les faits qui donnent lieu à l'application de leurs pouvoirs légaux. Les détectives par exemple, qui travaillent de façon assez occulte et, en fait, d'autres fonctionnaires comme les officiers supérieurs et ceux qui délivrent les mandats, s'appuient dans une large mesure sur le rapport de l'enquêteur. Bien que par suite de développements récents, on ait révélé au public certains aspects du mécanisme des mandats de perquisition[12], il reste que les circonstances entourant une enquête et la décision de demander un mandat de perquisition doivent rester sous le contrôle premier de la police. Par contre, ce pouvoir de contrôle ouvre la voie à une certaine part d'arbitraire dans l'interprétation des faits en vue d'obtenir les autorisations requises, ou de justifier *a posteriori* les activités de la police.

14. Enfin, les buts de la police, de même que ses méthodes, peuvent parfois se dissocier des objectifs des règles de la procédure pénale. Si le droit pénal est parfois appliqué au moyen des pouvoirs de fouille, de perquisition et de saisie tirant leurs sources de textes réglementaires, en revanche, les pouvoirs que crée la procédure pénale sont parfois utilisés aux fins plus larges du maintien de l'ordre, ce qui, à strictement parler, ne relève pas de l'application du droit pénal[13]. Le recours aux pouvoirs de fouille et de perquisition prévus en matière criminelle dans des contextes d'une telle généralité est aussi inévitable que l'aspect discrétionnaire de ces pouvoirs. Dans ces conditions, il va de soi que la réforme de ces pouvoirs n'aura jamais qu'un effet limité sur les pratiques policières.

15. Ce serait faire preuve d'une grande naïveté que de s'attendre à ce que la modification des règles de droit actuelles apporte une solution complète aux discordances qui existent actuellement entre le droit et la pratique. Pour aborder ces problèmes de façon rationnelle, il faut remonter jusqu'aux structures administratives et aux principes fondamentaux qui régissent l'activité de la police. Néanmoins, la réforme du droit n'en devient pas vaine pour autant. Même les auteurs qui ont préconisé une approche para-juridique pour analyser la question des pouvoirs discrétionnaires de la police, conviennent qu'il est nécessaire de définir clairement la portée des pouvoirs que la loi confère à la police[14]. Au demeurant, il se peut bien que le mépris ou la manipulation des règles dont on accuse souvent les policiers tiennent justement au caractère archaïque et confus de celles-ci.

16. Par ailleurs, c'est une chose que d'admettre l'existence, dans la pratique, de certaines divergences par rapport à la loi; c'en est

une autre que de renoncer à ce que les pratiques policières soient, dans la mesure du possible, conformes à la loi. Bien avant la Confédération canadienne[15], le principe de la suprématie du droit avait jeté les bases d'un système idéal d'application du droit pénal, dans lequel les représentants de l'État exerceraient leur pouvoir dans les limites fixées par la loi. Si un tel système n'a jamais pu être réalisé, il a néanmoins servi d'idéal, depuis ce temps, aux responsables de l'application de la loi. De nos jours, deux des dispositions de la *Charte canadienne des droits et libertés*, dont nous avons déjà parlé, consacrent l'actualité de cet idéal: l'article 7, qui énonce que chacun a droit à la liberté et à la sécurité de sa personne, et l'article 8, qui sanctionne le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives[16]. Affirmer que les pouvoirs discrétionnaires de la police ne peuvent être contrôlés au moyen de règles de droit reviendrait à réduire ces dispositions, de même que les règles de procédure régissant les fouilles, les perquisitions et les saisies en matière criminelle, à des vœux pieux. Nous ne saurions souscrire à une position aussi radicale.

II. Les principes directeurs de la réforme

A. La codification

17. Il va sans dire que la coexistence du common law et des textes législatifs ne fait qu'ajouter à la complexité des règles actuelles en matière de fouilles, de perquisitions et de saisies. Nous croyons qu'il serait préférable d'établir un système qui repose entièrement sur la législation. Nous ne préconisons pas l'abolition des principes et des mécanismes précieux du common law. Nous en recommandons plutôt l'intégration dans un code harmonieux et cohérent portant sur les pouvoirs de fouille, de perquisition et de saisie en matière criminelle.

18. Plusieurs arguments militent en faveur de l'abolition des règles coutumières. En tête de ces arguments vient le besoin de clarté. Dans son rapport récent, la "Royal Commission on Criminal Procedure" a passé en revue les règles de droit en vigueur en Angleterre et au Pays de Galle, en matière de fouilles, de perquisitions et de saisies, pour en arriver à la conclusion suivante:

[TRADUCTION]
Au cours des témoignages qui nous ont été présentés, on a principalement fait état de la nécessité de rationaliser et de moderniser ces mécanismes et ces pratiques, dont certains datent du siècle dernier et comportent des anomalies évidentes. Il existe un consensus en faveur de la codification et de la rationalisation de ces dispositions[17].

Bien qu'au Canada, les problèmes de confusion que suscitent les pouvoirs de common law n'aient jamais eu la même ampleur qu'en Angleterre, le degré d'incertitude qui caractérise certains de ces pouvoirs justifie l'adoption d'une attitude semblable à celle de la Commission royale. Par exemple, les limites de la légalité de la perquisition concomitante de l'arrestation n'ont jamais été définies, bien que l'on s'entende généralement pour dire que la fouille doit être limitée à l'espace placé sous le pouvoir de la personne arrêtée. Par ailleurs, les tribunaux canadiens n'ont jamais établi de façon claire les modalités de la perquisition «de consentement», notamment pour ce qui est de savoir quand elle peut être effectuée et quels biens peuvent être saisis.

19. Pour ce qui est des perquisitions «de consentement», la situation actuelle met en évidence un autre problème lié aux pouvoirs dont l'existence n'est pas sanctionnée par la législation: l'absence de mécanisme de protection général. Si l'on admet généralement que certaines conditions devraient être remplies lorsqu'un policier demande à un citoyen de consentir à une atteinte à sa personne, à sa vie privée ou à ses biens, il y aurait lieu de formuler ces conditions dans la loi. Même s'il reste souhaitable que les méthodes de la police puissent être adaptées aux particularismes locaux, le droit actuel va beaucoup plus loin. Il laisse l'application des mécanismes actuels de protection à la discrétion des diverses forces de police. En réalité, les citoyens ne sont pas les seuls qui aient à se plaindre de l'absence d'uniformité. Certains agents de la paix rencontrés par les recherchistes de la Commission ont en effet déclaré que l'absence de principes directeurs clairs rendait leur tâche beaucoup plus difficile.

20. En outre, il importe d'introduire dans la loi certaines garanties constitutionnelles contre «les fouilles, les perquisitions ou les saisies abusives»[18]. Le fait qu'un pouvoir de fouille, de perquisition ou de saisie tire sa source du common law ne rend pas ce pouvoir «abusif». Cependant, les limites de la légalité de l'exercice d'un tel pouvoir sont habituellement plus vagues et prêtent plus facilement à la contestation. Cela est particulièrement vrai dans le cas où l'exercice du pouvoir n'est pas appuyé par un mandat. En effet, le mandat comporte certaines exigences quant au caractère raisonnable

de l'acte autorisé. On peut donc soutenir que le retrait de cette protection impose l'obligation d'associer certaines garanties à ce pouvoir, en guise de compensation. Or la méthode la plus efficace pour assumer cette obligation reste encore l'adoption de dispositions législatives à cet effet.

21. Les avantages de la codification ont été exposés de façon fort détaillée dans un document d'étude publié par la Commission de réforme du droit et intitulé *Pour une codification du droit pénal*. Voici la conclusion à laquelle les auteurs de l'étude en sont arrivés:

> La codification, dans ce sens, permet de mieux atteindre les deux qualités que l'on doit rechercher dans la règle de droit: la prévisibilité de son application et sa certitude. Il est en effet plus facile pour un avocat qui fonctionne à l'intérieur d'un système de droit codifié, de connaître la portée de la règle et de pouvoir ainsi concrètement prédire la réaction des tribunaux à son application. Ce n'est pas scléroser la règle de droit que de la codifier, c'est seulement lui donner un degré d'acuité et de certitude plus grand, sans pour autant entraver son adaptation continuelle aux besoins sociaux et à la réalité[19].

Pour conclure, nous estimons que ces valeurs s'appliquent aux règles de droit concernant les fouilles, les perquisitions et les saisies, et qu'il y a lieu de codifier ce domaine du droit.

B. Simplification, équilibre et contrôle

22. La codification des règles de droit aurait bien peu d'intérêt sur les plans de la précision et de la certitude si elle devait être aussi complexe et byzantine que le système auquel elle se substitue. Aux États-Unis par exemple, certaines distinctions que les tribunaux ont établies entre diverses situations sèment la confusion tant chez les juges et les auteurs que chez les policiers. Cela a amené la Cour suprême des États-Unis, au cours des dernières années, à prôner l'établissement d'une ligne de démarcation claire entre ce qui est légal et ce qui ne l'est pas dans le domaine des fouilles, des perquisitions et des saisies sans mandat[20]. Paradoxalement, quelques-unes des «lignes de démarcation» qui ont été tracées par la suite demeurent assez obscures[21]. Au Canada, la sanction constitutionnelle qu'ont établie les dispositions de l'article 24 de la *Charte canadienne des droits et libertés* est venue réaffirmer la nécessité d'éviter de tels enchevêtrements.

23. En plus de faciliter la tâche des spécialistes du système d'application de la loi, la simplification des règles de droit permet aux citoyens de connaître les limites des pouvoirs des agents de la paix. Il est vrai que la réalisation de cet objectif peut être entravée par des facteurs qui n'ont rien à voir avec l'organisation et la nature des règles de droit. Ces facteurs ont été examinés dans l'étude intitulée "Access to the Law". L'auteur a cependant fait l'observation suivante:

> [TRADUCTION]
> Presque toutes les personnes ressources que nous avons rencontrées se sont entendues pour dire que les principaux problèmes qui caractérisent la forme actuelle des lois sont la langue ésotérique et alambiquée, la consultation difficile à cause de l'insuffisance des index, la structure complexe, ainsi que la difficulté de la mise à jour[22].

La simplification des mécanismes de fouille, de perquisition et de saisie pourrait sans doute apporter une solution, fût-elle partielle, à ces problèmes.

24. Cela étant dit, il ne faudrait pas pousser la simplification au point de négliger l'équilibre qui doit exister entre les intérêts en cause, ni les variables qui distinguent les différents types de situations où ces pouvoirs doivent être exercés. Parmi ces variables se trouvent la nature de l'objet recherché (un bien volé ou des stupéfiants), l'endroit où a lieu la perquisition (un immeuble ou un véhicule), l'urgence de la situation, l'attitude de la personne en cause, la gravité de l'infraction qui fait l'objet de l'enquête, les autres circonstances particulières de l'affaire, la mesure dans laquelle les pouvoirs seront probablement utilisés, ainsi que les possibilités d'abus. L'objectif de simplification ne saurait empêcher la prise en considération de ces variables. Cependant, il peut à l'occasion nous inciter à accorder plus d'importance à certaines d'entre elles.

25. L'établissement d'un contrôle sur la portée et la variété des dispositions conférant de tels pouvoirs doit être une considération majeure dans l'élaboration d'un nouveau système de règles. Certaines codifications et initiatives récentes en matière de réforme du droit ont mis en évidence la tâche difficile qui consiste à déterminer les différents facteurs pertinents et à établir un équilibre entre ceux-ci: le *Model Code of Pre-arraignment Procedure*, élaboré par l'"American Law Institute"[23], le *Criminal Investigation Bill*, inspiré des recommandations de l'"Australian Law Reform Commission"[24], de même que les recommandations de la "Royal Commission on Criminal Procedure in England"[25]. L'équilibre proposé varie quelque peu dans chaque cas, mais la nécessité de

maintenir un certain contrôle sur la prolifération des pouvoirs est un thème fondamental commun à tous ces travaux. C'est également l'objectif que nous poursuivons.

C. Une perspective d'ensemble

26. La réforme des règles de droit concernant les fouilles, les perquisitions et les saisies en matière criminelle peut être abordée de deux façons. D'une part, on pourrait conserver la structure générale des règles actuelles et tenter d'apporter les modifications ponctuelles qui s'imposent aux mécanismes existants. D'autre part, il serait possible de faire table rase de la structure actuelle et de procéder à une refonte générale des règles. C'est pour cette seconde solution que nous avons opté. En effet, la première nous aurait obligé à passer sous silence l'un des problèmes fondamentaux qui caractérisent les règles actuelles, soit l'incohérence de leur agencement.

27. L'incohérence du droit actuel dans ce domaine s'explique historiquement par l'approche empirique que l'on a adoptée en droit pénal: chaque problème nouveau entraînait l'adoption d'une nouvelle solution. Les propositions que renferme la présente étude reposent sur un principe différent: *a priori*, les règles de procédure devraient être basées sur les éléments communs des infractions et non sur les éléments qui les distinguent. Dans l'ensemble, la procédure prévue par le *Code criminel*, depuis l'arrestation jusqu'au procès, et de là jusqu'à l'appel, reflète implicitement cette conception. Ainsi, les règles de l'arrestation sont les mêmes, qu'il s'agisse d'un meurtre, de possession de drogues, d'une fraude relative aux métaux précieux ou d'une infraction en matière d'armes à feu. En fait, ces règles constituent en quelque sorte un code embrassant d'une façon générale les motifs de l'arrestation sans mandat (articles 449 et 450), la délivrance des mandats (article 455.3), la dénonciation (articles 455 et 455.1), de même que les mécanismes consécutifs à l'arrestation (articles 451, 452 et 453). Les règles spécifiques touchant certaines infractions et certains auteurs d'infractions ne découlent pas d'une particularisation historique. Elles répondent, dans un contexte général, à des impératifs particuliers d'ordre social comme la protection du public et la présence de l'accusé à son procès.

28. Il n'existe aucune raison valable pour ne pas donner une base générale aux règles relatives aux fouilles, aux perquisitions et aux saisies. Le législateur a d'ailleurs reconnu les avantages de cette

formule en matière de mandat, lorsqu'il a adopté, sous leur forme actuelle, les dispositions de l'article 443, il y a près de cent ans. Toutefois, on ne saurait faire de ces dispositions un cadre général pour l'ensemble des règles, et ce, pour deux raisons. En premier lieu, elles ne s'appliquent qu'aux perquisitions avec mandat. En conséquence, les motifs justifiant l'atteinte à la vie privée que constitue une fouille ou une perquisition sont fonction du mode d'autorisation utilisé. Or, nous nous inscrivons en faux contre ce raisonnement pour les motifs que nous exposerons un peu plus loin[26]. D'autre part, par suite de la prolifération de dispositions particulières depuis l'adoption de l'article 443, il n'est plus exact de prétendre que cet article constitue le code complet et exhaustif en matière de mandat qu'il était jadis. Bien que le régime de délivrance des mandats prévu à l'article 443 soit encore celui dont la portée est la plus grande et auquel on a le plus souvent recours, les dispositions qui le sous-tendent ne sont que quelques-unes parmi tant d'autres. Tout régime qui se veut complet doit embrasser toutes les justifications et tous les mécanismes appropriés, et non seulement ceux qui sont prévus à l'article 443.

29. L'adoption d'une nouvelle approche n'implique pas nécessairement le rejet global des règles actuelles. Bien au contraire, ces règles, de même que les principes qui les sous-tendent, constituent manifestement un point de départ logique. Dans la présente étude, nous entendons élucider ces règles et ces principes d'un point de vue critique, de façon à pouvoir les évaluer dans une perspective de réforme. Ainsi, dans les chapitres cinq, six et sept, nous proposerons un ensemble de règles générales applicables à toutes les fouilles, les perquisitions et les saisies. Aux chapitres huit et neuf, nous chercherons à déterminer dans quelle mesure il est légitime de déroger à ces règles pour répondre aux exigences de certains problèmes particuliers. Enfin, au chapitre dix, nous aborderons la question épineuse de l'application des règles de procédure.

III. Les principes fondamentaux

30. Avant d'entreprendre notre étude, il serait opportun d'énoncer brièvement deux postulats. Tout d'abord, nous reconnais-

sons que la question de la justification des fouilles, des perquisitions et des saisies se distingue de celle du mode d'autorisation applicable, et que sur le plan logique, la première doit être posée avant la seconde. Ensuite, nous posons comme postulat que le mandat doit en principe rester la seule façon d'autoriser une perquisition, sauf dans les cas où le recours au mandat est manifestement inopportun.

A. La séparation des justifications et des règles de procédure

31. Dans l'état actuel du droit, les motifs qui justifient l'atteinte à la vie privée que représente une perquisition ou une saisie sont directement fonction du mode d'autorisation de celles-ci. Ainsi, lorsque l'on parle des motifs pouvant justifier une perquisition avec mandat, on doit entendre tous les motifs pouvant donner lieu à la délivrance d'un mandat en vertu des diverses dispositions législatives discutées au chapitre précédent. Par conséquent, pour avoir une idée d'ensemble des motifs pouvant donner lieu à une perquisition ou à une saisie, il faut ajouter à tous les motifs permettant une perquisition avec mandat ceux qui peuvent donner lieu à une perquisition en vertu d'autres mécanismes prévus par la loi. Il existe en effet un chevauchement considérable entre les justifications associées à ces différents mécanismes de procédure. Or le fait que ces justifications soient associées aux modes d'autorisation des perquisitions ou des saisies tient davantage à une évolution historique divergente de ces mécanismes qu'à de véritables différences de fond.

32. Ainsi, dans le cas d'une fouille sans mandat concomitante d'une arrestation, quelle est la justification de l'atteinte portée? L'arrestation elle-même? Une telle réponse ne fait que déplacer la question. Pourquoi en effet l'agent qui effectue l'arrestation serait-il de ce fait autorisé à procéder à une fouille et à saisir des objets en possession de la personne? La jurisprudence a proposé un éventail de réponses: le prévenu peut avoir en sa possession les fruits de son forfait ou encore, d'autres preuves de l'infraction; il peut aussi avoir dissimulé une arme avec laquelle il pourrait blesser ceux qui l'ont arrêté et parvenir à s'échapper[27]. Toutes ces réponses traduisent la poursuite d'une série d'objectifs précis: enlever au prévenu l'objet qu'il a obtenu par la perpétration d'un crime, obtenir des preuves de l'infraction, et protéger la police de même que la société. Ces objectifs sont l'essence même des dispositions du *Code criminel*

(articles 443 et 101), et des dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* portant sur les perquisitions.

33. On ne peut pas en conclure, toutefois, que l'arrestation n'a aucune pertinence par rapport à la justification d'une fouille. En fait, nous sommes d'avis qu'une fouille est davantage justifiable, au regard de la sécurité, lorsqu'il y a eu arrestation que dans l'hypothèse contraire[28]. Cependant, il importe de souligner que même si les objets recherchés sont les mêmes dans le cas d'une arrestation et dans celui d'une perquisition, la fouille peut être effectuée sans mandat dans la première hypothèse, et non dans la seconde. L'explication de cette distinction tient aux circonstances de la fouille. En effet, l'agent de la paix qui se livre à une fouille au cours d'une arrestation fait face à une situation d'urgence. Dès lors, le délai nécessaire à l'obtention d'un mandat accroît le risque de voir la personne se débarrasser de l'objet qu'elle a en sa possession. En revanche, ce risque est beaucoup moins grand lorsqu'il s'agit d'effectuer une perquisition dans une maison afin de saisir un objet semblable.

34. L'étude des objectifs qui justifient les fouilles, les perquisitions et les saisies est donc distincte de celle des circonstances qui déterminent le mécanisme auquel on doit avoir recours pour les autoriser. En toute logique, le problème de la justification doit être examiné en premier. En effet, il ne sert à rien de déterminer quelle est la procédure appropriée, tant et aussi longtemps que l'on n'a pas justifié l'atteinte proposée. La Commission de réforme du droit de l'Australie[29] et l'"American Law Institute"[30] ont tous deux adopté cet ordre séquentiel dans les codifications qu'ils ont récemment proposées. Dans les deux cas, le code modèle définit tout d'abord les objets qui peuvent être visés par les fouilles, les perquisitions et les saisies, c'est-à-dire les objets dont l'intérêt pour l'État est suffisant pour justifier ces atteintes. La loi proposée établit ensuite les mécanismes permettant d'obtenir ces objets. Nous suivrons ce même ordre dans la présente étude.

B. L'exigence générale du mandat

35. Nous avons déjà parlé du caractère judiciaire que doit avoir le mécanisme de délivrance du mandat, ainsi que de la spécificité du mandat[31]. Ces caractéristiques visent à assurer deux choses. En premier lieu, aucune atteinte à la vie privée ne doit survenir avant que

l'existence d'une justification n'ait été objectivement établie. En second lieu, l'étendue de l'atteinte doit être claire aux yeux de celui qui fait la demande, de celui qui statue sur celle-ci, de celui qui exécute le mandat, ainsi que de toute personne qui est touchée par l'exercice du pouvoir. Ces garanties trouvent leur fondement dans le fait qu'en common law, on a toujours considéré que les atteintes à la vie privée découlant de l'exercice du pouvoir de perquisition et de saisie étaient très graves et devaient, en conséquence, être surveillées de près. Bien que l'expérience montre certaines lacunes dans le contrôle qu'exerce le processus de délivrance du mandat sur les pouvoirs discrétionnaires de la police, elle montre également que de façon générale, les limites de la loi sont relativement mieux respectées dans le cas des perquisitions avec mandat que dans le cas des perquisitions sans mandat. Outre les garanties préalables à l'atteinte, le mécanisme du mandat, qui repose sur des preuves documentaires, comporte notamment certains avantages en cas de contestation.

36. Si l'on accepte que le respect des droits individuels constitue une valeur sociale essentielle, il importe que la surveillance qui s'exerce notamment au moyen du mandat ait une portée aussi générale que possible. L'importance attachée par la loi à la répression des atteintes arbitraires à la vie privée a toujours été un élément capital à la base de l'instauration des pouvoirs de perquisition. Hale n'a pu cautionner le pouvoir conféré par le mandat qu'en y incorporant des garanties contre l'exercice abusif du pouvoir qu'il comporte[32].

37. Certes, les temps ont beaucoup changé depuis l'époque de Hale. Toutefois, les arguments qui militent en faveur d'une étroite surveillance des perquisitions ont gardé toute leur actualité. Ce serait être bien peu réaliste que de prôner l'interdiction absolue des perquisitions sans mandat. Toutefois, l'obtention d'un mandat doit demeurer la règle. Cette position a été adoptée de façon explicite par la jurisprudence américaine[33], et implicitement dans certaines décisions canadiennes telle l'affaire *Pacific Press*, où la Cour suprême de la Colombie-Britannique s'est montrée très restrictive à cet égard[34]. Dans l'optique de la réforme, cette position nous incite à simplifier les règles pour faire du mandat un mode d'autorisation plus efficace, plus accessible, et partant, plus couramment utilisé. Sur le plan des principes, le mandat devrait toujours constituer le mécanisme approprié pour autoriser une perquisition ou une saisie. En d'autres termes, pour peu que l'atteinte aux droits soit justifiée, elle devrait toujours être autorisée au moyen d'un mandat. Pour ce

qui est de savoir si un autre mécanisme devrait être mis à la portée de celui qui entend effectuer la perquisition, cela revient à se demander si les circonstances particulières de certaines situations peuvent rendre impraticable ou inutile le recours au mandat. Nous reviendrons sur cette question au chapitre six du présent document.

38. L'idée de donner la prééminence aux perquisitions avec mandat dans la loi peut paraître quelque peu déroutante et même saugrenue puisque dans la pratique moderne, les atteintes à la vie privée sans mandat sont devenues la règle plutôt que l'exception. C'est ce qu'a constaté Weiler en matière d'arrestation[35]. En revanche, l'utilisation courante du mandat en matière de perquisitions prouve que malgré l'état extrêmement confus du droit actuel, en pratique, on continue d'accorder un certain respect à l'exigence du mandat. Il est vrai que les circonstances poussent souvent l'agent à agir sans mandat et que sa décision est bien fondée la plupart du temps. Cela ne signifie pas pour autant que le pouvoir d'agir ainsi doive cesser d'être l'exception à la règle. Le caractère général de cette exigence ne repose pas sur des statistiques d'application. Il s'agit plutôt d'une question de principe. Ce principe exige seulement d'établir, avant de permettre une atteinte aux droits d'une personne dans un cas donné, que le recours au mandat est effectivement inopportun.

CHAPITRE CINQ

La justification des fouilles, des perquisitions et des saisies

I. L'application du droit pénal

39. En principe, le droit pénal doit être à l'image des valeurs fondamentales de la société. La violation des interdictions légales sanctionnant ces valeurs peut entraîner des atteintes sérieuses à la liberté et à la vie privée de la personne qui s'en rend coupable, la plus grave étant sans aucun doute l'imposition d'une sentence par suite de la déclaration de culpabilité. Pour ce qui est des pouvoirs de la police cependant, la question principale demeure celle de la justification des atteintes antérieures à la déclaration de culpabilité. À notre avis, cette question repose sur la nécessité d'établir un système susceptible de réagir efficacement à la perpétration des infractions.

40. Cependant, l'application du droit pénal n'a pas toujours répondu à des préoccupations aussi nobles. Certes, l'arrestation des auteurs d'infractions majeures ("felonies") était l'un des objectifs de Hale lorsqu'il a instauré les mandats de perquisition[36]. Mais à cette époque, seuls les biens volés pouvaient être saisis sous l'autorité de ces mandats. Du reste, pendant des siècles, on ne pouvait saisir des biens que dans la mesure où l'on croyait que leur possesseur n'y avait pas droit. Cette règle s'appliquait non seulement aux biens volés mais aussi aux biens de contrebande et même, selon certains auteurs, aux instruments du crime, à la possession desquels on attachait déjà un caractère coupable justifiant la confiscation de ces objets[37].

41. Le fait que l'État n'ait plus à invoquer un droit de propriété supérieur pour justifier les saisies s'explique par le déclin du

caractère sacré de la propriété au profit de l'application du droit pénal, en tant que valeur sociale prédominante. L'amorçe de ce renversement[38] coïncide avec l'instauration des forces policières au dix-neuvième siècle. Les tribunaux eurent tôt fait de reconnaître que l'importance de l'application du droit pénal, à titre d'objectif social, justifiait à elle seule le recours à des mécanismes comme la saisie. Ainsi, la nécessité de conserver les preuves de la culpabilité de l'accusé avait désormais préséance sur les droits de propriété de celui-ci sur toute chose ayant une valeur probante. Toutefois, l'expansion de la portée du mécanisme de saisie s'est faite à l'intérieur de limites soigneusement établies. Ces limites, qui sont restées les mêmes jusqu'à ce jour, découlent du caractère «réactif» du système de justice pénale.

A. Du crime à la réaction

42. Il peut sembler banal de noter que l'accusation et la poursuite criminelle, qui sont au cœur même de notre système de procédure pénale, constituent la réaction de la justice pénale à l'infraction commise. En effet, le procès fait suite à la mise en accusation, laquelle répond à la perpétration de l'infraction qui en fait l'objet. Mais le fait que le système canadien d'application de la loi repose sur un tel processus est en soi digne de mention. En effet, le système de type accusatoire et «réactif» n'est certainement pas le seul régime auquel un État puisse avoir recours pour appliquer ses lois. Ainsi, l'Angleterre a eu sa part d'institutions inquisitoriales, telles la Chambre étoilée et la "High Commission". La survie du système accusatoire est en grande partie attribuable à l'émergence d'un concept auquel on a attaché, au fil des années, une importance grandissante: la suprématie du droit.

43. Le premier principe sous-jacent à ce concept du droit a été formulé ainsi par Dicey:

> [TRADUCTION]
> Nul ne peut être puni ou ne peut être légalement contraint à subir un préjudice corporel ou matériel à moins d'avoir commis une infraction précise à la loi régulièrement adoptée, et que sa culpabilité n'ait été établie de la façon habituelle devant les tribunaux ordinaires du pays. Dans ce sens, la suprématie du droit s'oppose à tout système de gouvernement fondé sur l'exercice, par les autorités, d'un pouvoir de contrainte étendu, arbitraire ou discrétionnaire[39].

Pris au pied de la lettre, ce principe peut avoir pour effet d'interdire, avant le procès, toute atteinte à la personne ou aux biens de l'accusé, comme la saisie ou l'arrestation. Cependant, dans un passage subséquent, Dicey avait clairement prévu l'exercice de ces pouvoirs avant le procès, pour peu qu'ils soient [TRADUCTION] «légalement justifiés[40]».

44. Même si de nos jours, son application très large est devenue problématique dans certains contextes comme celui des organismes administratifs, le principe de la suprématie du droit demeure, dans son essence même, indiscutable et bien établi. Dicey s'est inspiré non seulement de l'histoire britannique, mais également de l'étude de l'histoire politique européenne. Il en était finalement venu à la conclusion que [TRADUCTION] «là où il existe des pouvoirs discrétionnaires, il y a place pour l'arbitraire[41]». En conséquence, l'expression «légalement justifié», en matière d'atteinte à la vie privée, a donc dû être définie en termes de conduite individuelle. Le principe élaboré par Dicey laisse donc sous-entendre que seule la conduite d'une personne peut justifier que l'état porte atteinte à sa vie privée[42].

45. Dicey a fait remarquer lui-même que la protection des libertés était sanctionnée non pas par les lois constitutionnelles, mais bien par une tradition jurisprudentielle[43]. De nos jours cependant, ces principes ont été repris, dans une certaine mesure, par la *Charte canadienne des droits et libertés*: l'égalité devant la loi, la protection contre toute détention arbitraire, le droit à un procès équitable et, ce qui nous intéresse au premier chef, le droit à la protection contre les fouilles, les perquisitions et les saisies abusives[44]. Fait plus important sans doute, ces mêmes principes sont à la base de nombreuses lois autorisant précisément ce genre d'atteintes à la vie privée. Mais si ces manifestations du concept de la suprématie du droit en confirment l'actualité sur le plan général, elles laissent sans réponse bon nombre de questions très importantes en ce qui concerne l'application pratique du droit pénal. En particulier, on peut se demander comment le rôle de la police moderne s'inscrit dans le cadre de ces principes restrictifs.

B. La police moderne et la prévention du crime

46. C'est la prévention du crime qui, sans aucun doute, a été à l'origine du mouvement d'instauration de la police moderne, comme

en témoigne cet extrait des instructions générales adressées en 1829 aux forces policières londoniennes nouvellement crées:

> [TRADUCTION]
> Il faut tout d'abord comprendre que l'objectif principal à atteindre est «la prévention du crime». Tous les efforts de la police doivent tendre vers ce but. La sécurité des personnes et des biens, de même que la réalisation des autres objectifs de l'organisme policier, seront ainsi mieux assurées que par la seule découverte et punition de l'auteur une fois l'infraction commise ....[45]

Cependant, cette stratégie préventive se manifestait surtout par des activités ne présentant pas un caractère attentatoire à la vie privée d'autrui, comme les patrouilles policières. Parmi les auteurs britanniques du dix-huitième et du dix-neuvième siècles, même les plus fervents partisans de la prévention du crime n'allaient pas jusqu'à préconiser l'atteinte aux droits individuels avant que la perpétration de l'infraction ait été amorcée. Ainsi, Bentham, le grand champion des mesures préventives, a reconnu explicitement cette limite : le rôle de la police, déclarait-il, devrait être [TRADUCTION] «d'intervenir dès les signes avant-coureurs de la perpétration d'une infraction[46]».

47. Pendant la période qui a suivi la création de la police moderne, on a élaboré de nouvelles techniques plus efficaces d'application de la loi, sans toutefois remettre en question le principe selon lequel la police ne doit pas empiéter sur les droits individuels avant que la perpétration d'une infraction ait été amorçée. Or, ce principe est-il toujours applicable? On peut soutenir la négative en s'appuyant sur le vieil adage: mieux vaut prévenir que guérir[47]. Suivant cet argument, en prévenant la perpétration de l'infraction, l'initiative de la police profite à tous. Elle épargne au public les coûts qu'entraînerait la consommation de l'infraction, elle décharge le système judiciaire d'éventuelles poursuites, et elle n'inflige à la personne en cause qu'une atteinte relativement légère en regard de la détention, du procès et de la sentence auxquels cette personne s'exposerait en accomplissant l'acte en question.

48. Cependant, on peut reprocher à cet argument de compromettre gravement la liberté individuelle. Bien sûr, il est possible de définir les pouvoirs d'intervention préventive en termes de motifs ou de soupçons raisonnables. Mais pris hors contexte, le caractère «raisonnable» perd son intérêt à titre de garantie, puisque des facteurs comme la réputation de la personne peuvent entrer en jeu. De nos jours, ce problème est particulièrement épineux. En effet, dans la mesure où l'approche préventive permet à la police de porter

atteinte à la vie privée d'une personne à cause des penchants criminels de celle-ci, et non parce qu'elle a commis un crime particulier, on se trouve à donner dans le piège que Dicey redoutait[48]. Le fait que telles atteintes aient pu être commises sous le couvert d'un système se réclamant du principe de la suprématie du droit a permis de contourner une question fondamentale: la prévention du crime est-elle un objectif suffisamment important pour justifier la dérogation aux limites imposées par la tradition à l'application du droit pénal?

49. En somme, la réponse à cette question prend un caractère politique. Dans son rapport intitulé *Notre droit pénal*, la Commission a reconnu les limites des mesures sentencielles à cet égard:

> Le principal problème vient de ce que notre société est tellement imbue de valeurs, tels le sentiment d'humanité et le respect de la liberté, qu'elle refuse d'adopter des mesures suffisamment sévères pour rendre l'intimidation véritablement efficace .... À vrai dire, la nature même de notre société empêche le droit pénal d'organiser pleinement l'avenir[49].

Ces mêmes valeurs imposent des restrictions aux premiers stades de l'application du droit pénal. Il va sans dire que la prévention du crime constitue un objectif social important, et on ne peut qu'encourager la poursuite de cet objectif au moyen des méthodes traditionnelles comme les patrouilles, et des méthodes relativement plus modernes comme les programmes d'éducation et de participation du public. Toutefois, le respect des droits individuels doit primer. Le droit, en général, doit restreindre la justification de ces atteintes aux seuls cas où la perpétration de l'infraction a été amorçée.

50. L'atteinte, une fois portée, peut en fait avoir un effet préventif. L'une des raisons fondamentales qui justifie que l'on porte atteinte aux droits de celui qui a commis une infraction est précisément de protéger le public contre la récidive. Ce principe ressort clairement des dispositions du *Code criminel* portant sur l'arrestation, la détention et le cautionnement[50]. La nécessité «d'empêcher que l'infraction ne se poursuive, ne se répète ou qu'une autre infraction ne soit commise» doit être prise en considération par celui qui effectue l'arrestation, par le fonctionnaire responsable et par l'officier de justice qui préside l'enquête où sont présentés les motifs justifiant la détention. Nous reconnaissons le bien-fondé de cette exigence que l'on retrouve dans le cas des fouilles concomitantes de l'arrestation. On ne saurait donc s'opposer à ce genre d'atteintes à la vie privée en invoquant leur caractère exclusivement préventif, puisqu'elles ont lieu après que la perpétration de l'infraction a été amorçée.

C. Les fouilles, les perquisitions et les saisies à titre de mécanismes de réaction

51. Bien que notre système de procédure pénale soit fondé sur l'accusation et la poursuite qui suivent la perpétration d'une infraction criminelle, les rapports entre les pouvoirs de fouille, de perquisition et de saisie et ces institutions ont un caractère assez particulier. En pratique, bon nombre de perquisitions sont effectuées, avec ou sans mandat, sans que cela donne lieu au dépôt d'une dénonciation[51]. Inversement, nombreuses sont les enquêtes et les poursuites où l'on n'a pas recours aux pouvoirs de fouille, de perquisition ou de saisie[52]. Bien qu'en théorie, il existe toujours des liens entre les perquisitions et les poursuites, ces liens sont beaucoup plus souples que ceux qui caractérisaient les premiers pouvoirs de fouille, de perquisition et de saisie, lesquels visaient expressément les personnes soupçonnées d'infraction et les criminels en état d'arrestation. Les conditions entourant les fouilles sans mandat sont demeurées essentiellement les mêmes. Si elles sont maintenant sanctionnées par la loi dans les cas où il ne s'agit pas d'une arrestation, elles visent toujours des biens, comme des armes ou des drogues, dont la possession par la personne fouillée est susceptible de constituer une infraction. En revanche, dans le contexte des perquisitions avec mandat, ces conditions ont connu une évolution profonde.

52. À l'origine, une perquisition ne pouvait être effectuée avec un mandat que lorsqu'une accusation avait été portée. Par exemple, le mandat élaboré par Hale ne pouvait être délivré qu'en réponse à une plainte déposée contre la personne en possession d'objets volés. Une fois délivré, le mandat autorisait l'arrestation aussi bien que la perquisition[53]. Cette exigence a été abolie depuis longtemps. Dans l'affaire *Parti libéral du Québec* c. *Mierzwinski*, Madame la juge Barrette-Joncas a conclu en ces termes: «La jurisprudence reconnaît que la mention du nom d'un accusé éventuel n'est pas nécessaire pour l'obtention d'un mandat de perquisition[54]». En fait, comme le confirment les résultats de notre enquête sur le mandat, bon nombre de mandats sont exécutés contre des personnes qui ne sont même pas soupçonnées par la police d'avoir participé à la perpétration de l'infraction: 20 pour cent des mandats examinés par le comité de juges que nous avions constitué faisaient partie de cette catégorie[55].

53. Il est tout à fait acceptable pour la police d'effectuer la perquisition d'abord et de ne déposer une accusation qu'à la fin de

l'enquête. Cette façon de procéder est tout à fait logique puisque, d'une part, le dépôt d'une accusation constitue une atteinte plus grave à la liberté de l'individu et que, d'autre part, il peut inciter le prévenu à détruire les éléments de preuve. En outre, en cas de perquisition sans mandat, les circonstances qui peuvent avoir rendu impraticable l'obtention d'un mandat peuvent avoir le même effet quant au dépôt préalable d'une dénonciation. Quoi qu'il en soit, il importe de s'assurer que les pouvoirs de fouille, de perquisition et de saisie ne sont exerçés que lorsqu'ils servent suffisamment les intérêts de l'application du droit pénal pour justifier une telle atteinte aux droits de la personne. Ces intérêts s'identifient aux buts de la fouille, de la perquisition ou de la saisie: l'obtention de choses ou de renseignements, ou la saisie de fonds. La question consiste alors à déterminer quels sont les choses, les renseignements ou les fonds à l'égard desquels la police devrait être habilitée à effectuer une perquisition ou une saisie, dès lors que la perpétration d'une infraction criminelle a été amorcée.

54. Considérée sous cet angle, cette question s'écarte quelque peu de l'approche traditionnelle. Ainsi, elle suppose que l'obtention de renseignements au moyen d'une fouille ou d'une perquisition constitue un exercice valable de ce pouvoir, comme le fait de prendre des objets matériels. Pourtant, l'approche traditionnelle, formulée dans l'affaire *Bell Telephone*[56], consistait à restreindre la perquisition (avec mandat) à la saisie d'objets matériels susceptibles d'être utilisés en preuve. De même, le blocage de fonds, opération intangible en soi, déborde les limites de l'interprétation restrictive du droit actuel. Par conséquent, avant d'aborder la classification des choses qui peuvent être saisies en matière criminelle, il serait opportun d'établir clairement que l'obtention de renseignements et la saisie de fonds sont visées par ces mécanismes.

D. Choses, fonds et renseignements

RECOMMANDATION

1.Compte tenu des techniques modernes d'obtention et de conservation des choses et des renseignements, il devrait être clairement énoncé que la saisie comprend notamment:

a) le fait de photographier une chose «saisissable»;

b) l'obtention de dossiers «saisissables», quelles que soient leur forme matérielle ou la façon dont ils sont conservés; et

c) le blocage de fonds «saisissables» dans les registres comptables.

(1) *Choses et renseignements*

55. À l'origine, le mandat de perquisition visait des objets concrets, tels que les biens volés ou les instruments d'un crime, sur lesquels l'État ou celui qui demandait la délivrance du mandat pouvait prétendre à un droit de propriété supérieur à celui du possesseur. Le but de la saisie était de mettre l'objet sous main de justice jusqu'à ce qu'il soit confisqué ou restitué à son propriétaire. Mais si les premières lois dans ce domaine ne reconnaissaient pas explicitement la valeur probante des objets saisis, ceux-ci n'en restaient pas moins à la disposition du juge des faits. En réalité, dans les cas d'accusation de possession de biens volés, le juge des faits était la plupart du temps celui à qui les biens volés avaient été remis par suite de la saisie[57].

56. En fait, l'utilisation aux fins de la preuve des objets saisis a d'abord été intégrée à la législation dans les cas d'infractions majeures, notamment en matière de fausse monnaie, infraction qui n'était pas du ressort du juge de paix ou du magistrat. Le rôle de ce dernier se limitait donc désormais à mettre les objets saisis en sécurité en vue du procès[58]. Une fois sanctionné par la loi, ce mécanisme mit en évidence le fait que les objets n'étaient pas saisis seulement en vue de la confiscation ou de la restitution au propriétaire; ils avaient également une valeur probante aux fins du procès. Puis, au fur et à mesure que les activités d'enquête ont été confiées à la police moderne, on s'est rendu compte que les renseignements additionnels qu'apportaient les objets saisis relativement à l'accusation étaient utiles non seulement au juge des faits, mais aussi à la police. Le droit actuel admet clairement l'utilisation des choses saisies dans le cadre des enquêtes menées par la police. Dans l'affaire *PSI Mind Development Institute*, on a jugé que le mandat constituait l'un des [TRADUCTION] «mécanismes légaux dont dispose [la police] pour se livrer à ses propres enquêtes[59]».

57. L'exercice par la police du pouvoir de fouille et de perquisition en vue d'obtenir des renseignements s'est manifesté très tôt dans le cas des fouilles sans mandat concomitantes de l'arrestation. Dans l'affaire *Dillon* v. *O'Brien*, on a reconnu que la

préservation d'une preuve établissant la culpabilité de la personne arrêtée justifiait la saisie des choses trouvées en sa possession[60]. Pourtant, depuis longtemps déjà, il était admis que la fouille concomitante de l'arrestation visait en outre l'obtention d'autres renseignements, à savoir si la personne arrêtée dissimulait une arme présentant un danger pour la personne procédant à l'arrestation[61]. Autrement dit, il était beaucoup plus important de savoir si la personne avait en sa possession un tel objet, que d'enlever l'objet lui-même.

58. Si l'obtention des renseignements que fournissent ces objets, ne serait-ce que par leur présence, suffit à justifier la fouille ou la perquisition, en toute logique, la définition de la saisie devrait inclure les autres modes d'obtention de renseignements qui ne comportent pas la préhension matérielle des choses. En réalité, dans bien des cas, l'enregistrement, sous une forme quelconque, des renseignements que fournissent les choses est suffisant et cause beaucoup moins d'inconvénients à la personne concernée que le fait d'emporter ces choses. Prenons un exemple. Un meurtre est commis dans la maison de X, sans que celui-ci ait pris part au crime. On découvre sur les meubles des traces de balles. Il est évident que la police peut, en vertu des dispositions de l'alinéa 443(1)*b*) du *Code criminel*, obtenir un mandat l'autorisant à saisir ces meubles. En revanche, aucune disposition de la loi ne l'autorise clairement à entrer chez X, à moins d'avoir obtenu le consentement de celui-ci, pour photographier et mesurer les trous laissés par les balles. Pourtant, est-il besoin de préciser que l'atteinte portée aux droits de X est beaucoup plus grave dans le premier cas?

59. Les dispositions du paragraphe 29(7) de la *Loi sur la preuve au Canada* reconnaissent explicitement la possibilité d'enregistrer les renseignements recherchés, au lieu d'enlever les choses visées par la perquisition. Cette disposition, qui porte sur la saisie de documents dans les locaux des institutions financières, énonce notamment ce qui suit:

> ... à moins qu'il ne soit mentionné expressément, sur le mandat, par la personne sous la signature de laquelle il a été émis, que ce mandat n'est pas limité par les dispositions du présent article, l'autorisation, conférée par un tel mandat, de perquisitionner dans les locaux d'une institution financière, de saisir et d'emporter tout ce qui peut s'y trouver, doit, en ce qui concerne les livres et les registres de cette institution, être interprétée comme limitée à la perquisition dans ces locaux aux fins d'examiner les inscriptions dans ces livres ou registres et d'en prendre copie[62].

Sans doute est-il essentiel pour un établissement financier de conserver ses livres et ses registres. Cependant, le principe voulant que les atteintes à la vie privée des citoyens soient réduites au strict minimum a une portée beaucoup plus générale. Lorsqu'il suffit, pour servir les intérêts de la justice, de photographier des choses plutôt que de les emporter, cette façon de procéder devrait être non seulement autorisée, mais fortement encouragée. L'adoption d'une telle politique impliquerait la modification des règles de preuve et des règles de droit relatives aux fouilles, aux perquisitions et aux saisies. En ce sens, cette question déborde le cadre de la présente étude. Cependant, nous pouvons tout de même recommander que la définition de la saisie comprenne le fait de prendre des copies de documents ou des photographies. Par ailleurs, afin que le pouvoir de perquisition et de saisie ne soit pas utilisé pour masquer des activités de surveillance, la loi devrait préciser que cette définition n'inclut pas le fait d'enregistrer un fait qui suit le début de la perquisition[63].

60. La saisie devrait également inclure la collecte de données informatisées. *A priori*, il n'y a effectivement aucune raison de rendre insaisissable, du fait qu'il est contenu dans un ordinateur, un renseignement qui serait saisissable s'il figurait dans un document quelconque. Ainsi, on retrouve ce principe dans le projet de loi fédéral concernant le droit à l'information, lequel permet l'accès aux documents de l'administration. Ce projet de loi contient la définition suivante:

> «document» Tous éléments d'information, quels que soient leur forme et leur support, notamment correspondance, note, livre, plan, carte, dessin, diagramme, illustration ou graphique, photographie, film, microformule, enregistrement sonore, magnétoscopique ou informatisé, ou toute reproduction de ces éléments d'information[64].

Nous croyons qu'une définition aussi large serait également appropriée en matière de perquisition et de saisie.

61. Certes, le fait de permettre aux agents de police de photographier des objets ou d'obtenir des renseignements informatisés peut constituer une menace envers le droit à la vie privée. Comme ces méthodes sont beaucoup plus discrètes que le fait d'enlever des choses, on pourrait craindre que, forts de tels pouvoirs, les policiers se mettent à espionner les citoyens de façon systématique. Sans vouloir minimiser ces préoccupations, nous ne croyons pas que les mécanismes de perquisition et de saisie devraient être restreints aux méthodes primitives qu'ils comportaient jadis. Ce serait là favoriser les criminels qui savent mettre à profit la technologie moderne. Si nous préconisons l'élargissement des règles

de droit dans ce domaine, c'est plutôt en vue de soumettre l'obtention de renseignements aux mêmes principes et aux mêmes garanties que la saisie d'objets matériels. Cela implique, entre autres, certaines prises de position en matière de procédure, ce dont nous parlerons un peu plus loin. À ce stade, il importe de préciser que les renseignements enregistrés ou conservés d'une façon quelconque sont soumis aux mêmes règles que les objets matériels, en ce qui a trait au caractère saisissable.

(2) *Le blocage de fonds*

62. La dernière partie de notre recommandation vise à clarifier les règles de droit concernant les registres comptables. Signalons pour commencer qu'il est établi depuis très longtemps que l'argent acquis illégalement peut être saisi s'il se trouve sous une forme tangible. Ainsi, en 1836, dans l'affaire britannique *Burgiss*, on a décidé que les pièces de monnaie trouvées en possession d'un prisonnier accusé de faux pouvaient être saisies puisqu'il existait des motifs raisonnables de croire que cet argent avait été obtenu par la perpétration du crime[65]. Cela étant dit, il va de soi que l'argent ainsi obtenu peut être converti en biens de toutes sortes. Aussi les tribunaux canadiens de common law ont-ils reconnu qu'il était légitime, aux fins de la restitution, de saisir le bien acquis par la conversion de l'argent en question, voire par des conversions successives. Mais encore fallait-il être en mesure d'établir le lien entre ce bien et l'argent. On a fait remarquer que le dépôt de l'argent dans un compte en banque ne soustrayait pas celui-ci aux pouvoirs de saisie du common law[66]. En outre, suivant la définition très large que l'on retrouve à l'article 2 du *Code criminel*, les termes «biens» et «propriété» comprennent «le droit de recouvrer ou de recevoir de l'argent ou des marchandises». En conséquence, on a considéré que les infractions concernant les biens pouvaient inclure la possession de fonds dans un compte[67]. Nous souscrivons entièrement à ces opinions.

63. En vertu des règles actuelles, la saisie de la provision d'un compte bancaire pose un problème dans la mesure où les dispositions du paragraphe 443(1) du *Code criminel* permettent la saisie d'une «chose» (en anglais "anything") visée par les catégories énumérées. Or, il n'est pas sûr que dans ce contexte, le mot «chose» puisse viser une obligation intangible comme un prêt ou une dette[68]. Ainsi, dans la décision qu'elle a rendue récemment dans l'affaire *Cuthbertson*, la Chambre des lords a décidé qu'une disposition semblable établissant

un pouvoir de saisie en matière de drogues ne s'appliquait pas aux profits tirés du trafic de drogues, lesquels avaient été déposés dans un compte en banque, puisqu'il ne s'agissait plus de [TRADUCTION] «choses tangibles[69]». Il est douteux que les tribunaux canadiens abondent dans ce sens, mais il serait plus prudent que les dispositions concernant les perquisitions et les saisies qui doivent s'appliquer aux fonds placés dans des comptes soient formulées en termes clairs.

II. Les choses saisissables

RECOMMANDATION

2.Devraient être reconnus comme «saisissables» les choses, fonds ou renseignements:

a) qui constituent les produits d'une infraction;

b) qui constituent la preuve de la perpétration d'une infraction; ou

c) dont la possession, dans les circonstances de l'espèce, constitue une infraction.

Le terme «produits d'une infraction» désigne un bien volé ou enlevé illégalement à la victime de l'infraction. Il inclut le bien qui a été acquis par l'échange ou la conversion du bien qui était initialement en possession de l'accusé.

64. Dans cette section, nous tenterons d'élaborer une définition du terme «saisissable», c'est-à-dire de déterminer les choses qui peuvent toujours justifier une fouille, une perquisition ou une saisie, que ce soit en vertu d'un mandat ou, exceptionnellement, sans mandat. Un examen des lois et de la jurisprudence révèle que traditionnellement, le sytème d'application du droit pénal a réparti en cinq catégories les choses, les fonds ou les renseignements qui peuvent être saisis:

a) ceux qui sont indispensables à la protection physique des agents de la paix et des citoyens en général;

b) ceux qui constituent les «produits de l'infraction», expression qui englobe les biens soustraits illégalement et les profits tirés de la perpétration d'une infraction;

c) ceux dont la possession, dans les circonstances de l'espèce, constitue une infraction;

d) ceux qui constituent la preuve de la perpétration d'une infraction; et

e) ceux qui ont servi ou peuvent servir à la perpétration d'une infraction.

Dans notre recommandation, qui suit le paragraphe 100, nous avons voulu condenser et rationaliser ces catégories. Toutefois, afin de bien expliquer notre position, il serait utile d'analyser ces catégories l'une après l'autre. En outre, il y a lieu d'examiner la possibilité de recourir à ces pouvoirs dans le cas des personnes détenues illégalement.

A. La protection

65. En common law, cette justification a toujours été associée aux fouilles concomitantes de l'arrestation. De nos jours, on la trouve dans les dispositions de l'article 101 du *Code criminel*, qui permet à l'agent de la paix de procéder à une fouille ou à une perquisition en vue de saisir diverses armes, lorsqu'il «existe des motifs raisonnables de croire qu'il n'est pas souhaitable pour la sécurité de cette personne ou pour celle d'autrui» que cette personne ait de telles armes en sa possession, sous sa garde ou sous son pouvoir. En pratique, comme on pouvait s'y attendre, ces fouilles «à caractère préventif» sont très fréquentes et sont, le plus souvent, exécutées sans mandat.

66. Le caractère particulier de cette justification réside dans le fait qu'elle ne concerne ni le passé, ni même le présent, mais bien l'avenir. Autrement dit, cette justification semble, en apparence, déroger au processus normal d'application de notre système pénal, c'est-à-dire la réaction postérieure au crime. Mais si l'on replace cette justification dans le contexte de l'arrestation, on constate que l'ordre est respecté. En soi, l'arrestation constitue la réaction du système à la perpétration d'une infraction. La fouille, dans la mesure où elle présente un caractère préventif, s'inscrit dans le cadre de l'arrestation et a essentiellement pour but d'empêcher une évasion et de garantir la sécurité de la police et du public. Comme on l'a reconnu dans l'affaire *Leigh* v. *Cole*, [TRADUCTION] «la police doit bénéficier de toute la protection nécessaire à l'exécution d'un devoir pénible, ardu et difficile — un devoir qui est indispensable au bien-être et à la sécurité de la collectivité toute entière[70]». Nous formulerons plus loin

les règles que nous proposons concernant les fouilles, les perquisitions et les saisies à caractère préventif qui accompagnent l'arrestation[71].

67. On pourrait soutenir que le critère de la «sécurité» prévu à l'article 101 n'est qu'un prolongement du principe à la base de la fouille à caractère préventif concomitante de l'arrestation. Pourtant, on ne saurait trop insister sur l'importance de ce prolongement. En effet, en dérogeant au schéma normal de réaction au crime, cette disposition laisse le champ libre aux fouilles basées sur la réputation plutôt que sur la conduite réelle. Elle introduit une part d'incertitude dans le droit criminel et ouvre la voie aux interventions arbitraires. Quoique légitimes dans le contexte de la protection contre les armes à feu, les dispositions de l'article 101 doivent rester une exception à la règle générale. Nous reviendrons plus loin sur cette question[72].

68. Essentiellement, le mécanisme de saisie d'armes à feu à des fins préventives subordonne le droit du citoyen de posséder des armes (si tant est qu'elles lui appartiennent) à la sécurité des agents de la paix et du public. En effet, l'État ne saurait, dans ce cas, prétendre à un droit de propriété supérieur sur l'arme. Aussi la loi reconnaît-elle, dans une certaine mesure, qu'il y a lieu d'indemniser le propriétaire de l'arme confisquée lorsque aucune infraction n'a été commise. C'est là du moins la conclusion à laquelle en est venue la Cour provinciale de l'Ontario dans l'affaire *Thomson*, qui portait sur l'interprétation des dispositions de l'article 101, et dans laquelle on a versé à la propriétaire le produit de la vente en justice de certaines armes qui lui avaient été enlevées[73]. Sur le plan théorique, il existe une distinction entre la saisie à caractère purement préventif et la saisie d'armes dont la possession est illégale ou qui ont servi à la perpétration d'un crime. En vertu des dispositions du paragraphe 100(3) et de l'article 446, dans ces derniers cas, les armes sont confisquées.

69. Il existe certains recoupements entre le principe de la protection des agents de la paix et du public, et d'autres justifications des fouilles, des perquisitions et des saisies. Le *Code criminel* contient de nombreuses dispositions prohibant ou réglementant l'usage et la possession d'armes[74]. Ainsi, nombreux sont les cas où, d'après la loi, il est raisonnable de croire que les circonstances entourant la possession de l'arme constituent une infraction, ou que l'arme peut servir de preuve dans un procès relatif à un crime de violence. Néanmoins, nous estimons qu'en dehors de ces cas, et sauf dans le contexte particulier de l'arrestation, le principe de la protection ne peut justifier, en soi, une fouille, une perquisition ou

une saisie. C'est pourquoi, dans notre définition fondamentale du terme «saisissable», nous n'avons pas inclus de catégorie distincte concernant la protection.

B. Les produits de l'infraction

70. Le terme «produits d'une infraction», dont la version anglaise "fruits of crime" figure dans le *Code de l'A.L.I.*[75] et dans les "American Federal Rules"[76], désigne en fait deux catégories distinctes de choses. La première catégorie est celle des biens soustraits illégalement à la victime qui en est le possesseur légitime, et des choses ou fonds qui ont été acquis par conversion des biens soustraits. Suivant le droit actuel, on trouverait dans cette catégorie les biens volés[77], les biens résultant d'une fraude, d'un faux, de l'extorsion ou de la vente de biens volés[78], ainsi que le véhicule à moteur pris sans le consentement de son propriétaire[79]. Par souci de clarté, nous appellerons cette catégorie «choses soustraites». Vient ensuite la catégorie des biens qui constituent les profits tirés de la perpétration d'une infraction comme le trafic de stupéfiants[80], de drogues contrôlées ou d'usage restreint[81], ou encore la vente de publications obscènes[82]. Contrairement aux choses soustraites, ces profits n'ont pas de propriétaire légitime. C'est pourquoi l'État a affirmé à plusieurs reprises son droit de les confisquer, puisque leur possesseur ne les aurait jamais touchés s'il n'avait pas violé la loi. Dans ce cas, nous parlerons de «profits» résultant de la perpétration d'une infraction.

71. Ces deux catégories de choses soulèvent un certain nombre de problèmes de procédure et d'application pratique, comme le cas où une somme d'argent provenant de la perpétration d'un crime est déposée dans un compte en banque et n'est plus identifiable. Nous reviendrons un peu plus loin sur ces problèmes[83]. Pour le moment, occupons-nous des justifications relatives à la saisie de choses faisant partie de ces deux catégories, en vertu des pouvoirs de fouille, de perquisition et de saisie en matière criminelle.

(1) *Les choses soustraites*

72. La reprise de choses soustraites illégalement est la plus ancienne justification de la perquisition avec mandat, et remonte à

l'époque de Hale. En pratique, les choses soustraites sont souvent celles qui sont visées par la perquisition, même si le mandat énonce que les biens sont recherchés à titre de [TRADUCTION] «preuve de la perpétration de l'infraction[84]». On retrouve le même objectif dans le contexte des fouilles concomitantes de l'arrestation. Ainsi, dans l'affaire *Percival and McDougall*, la Cour a refusé de restituer de l'argent utilisé en preuve au procès, notamment parce que cet argent, qui se trouvait en possession des accusés lors de leur arrestation, avait été volé[85].

73. Si les choses soustraites sont mises sous main de justice, c'est en vue de les restituer à la victime de l'infraction. En fait, il est reconnu depuis longtemps que la victime elle-même dispose de certains droits pour récupérer les biens meubles qu'une autre personne s'est appropriés illégalement[86]. L'intervention de l'État introduit un nouvel élément dans le processus de restitution: l'État agit comme intermédiaire entre l'accusé et la victime. Ce processus prend fin lorsque le tribunal, à la fin du procès, rend une ordonnance aux termes de l'article 655 du *Code criminel*, lequel énonce que les «biens obtenus par suite de la perpétration de l'infraction» doivent être rendus à la personne qui y a droit. Cela étant dit, cette disposition n'est pas la seule qui offre un redressement de cette nature. On trouve également, dans le *Code criminel*, les dispositions de l'article 653 (qui permettent au tribunal d'ordonner le versement, par l'accusé, d'un montant d'argent à titre de réparation ou de dédommagement pour la perte de biens ou le dommage causé à des biens), celles de l'article 654 (qui prévoient l'indemnisation de l'acheteur de bonne foi), de même que celles de l'alinéa 663(2)*e*) (en vertu desquelles la restitution peut être une condition d'une ordonnance de probation). Cependant, nous sommes d'avis que les dispositions concernant les fouilles, les perquisitions et les saisies ne devraient pas traiter de la restitution d'une façon aussi générale. À ce stade, notre propos se borne à insister sur le fait qu'il doit y avoir un lien entre les choses saisies et les choses soustraites illégalement.

74. Notre position s'inspire du principe élaboré par Dicey, suivant lequel une personne ne doit pas être punie avant d'avoir été condamnée. Malgré les inconvénients qu'elles imposent à la personne soumise à la fouille ou à la perquisition, la saisie de choses et leur restitution au propriétaire légitime ont avant tout un caractère réparateur plutôt que punitif. Elles remettent les parties dans l'état où elles étaient avant la perpétration de l'infraction. Du reste, aux termes de l'article 655, le pouvoir de restituer définitivement les biens à leur propriétaire ne dépend pas de la déclaration de culpabilité de

l'accusé. Ce pouvoir tire sa source de l'intérêt qu'a l'État à s'assurer qu'à la fin du procès, la victime a récupéré ce qui lui appartient. En réalité, priver l'accusé de ces biens ne constitue pas une punition puisqu'il n'a sur eux aucun droit de propriété légitime.

75. En revanche, la saisie de choses qui n'ont aucun lien avec la perpétration de l'infraction présente un caractère essentiellement punitif. Une telle saisie aurait pour effet d'anticiper sur l'issue du procès en condamnant l'accusé *a priori*, et sur l'ordonnance de restitution qui peut faire partie de la sentence. Qui plus est, elle punit l'accusé avant son procès en le privant de biens sur lesquels il a un droit de propriété indiscutable. Par conséquent, à moins que l'État n'ait un motif distinct pour prendre possession de ces choses, comme la valeur probante de ceux-ci, nous sommes d'avis que la saisie et la détention de ces biens avant le procès sont inacceptables.

76. Cela étant dit, nous admettons qu'il est légitime de saisir les choses liées à celles qui ont été soustraites initialement. Cette position s'appuie sur la portée très large de la définition des termes «biens» et «propriété», que l'on retrouve à l'article 2 du *Code criminel*, et qui vise les choses qui ont été obtenues par la conversion ou l'échange des choses soustraites initialement. En plus de s'appliquer au processus de restitution prévu à l'article 655, cette définition pourrait être utilisée conjointement avec les dispositions de l'article 312 du *Code*, afin d'obtenir la délivrance, en vertu des dispositions de l'article 443, d'un mandat de perquisition visant les choses liées à la perpétration de l'infraction. Ainsi, dans le cas où il serait allégué dans une dénonciation qu'une personne a en sa possession une chose obtenue par la perpétration d'un crime, un juge de paix pourrait délivrer un mandat en vue de saisir le bien puisqu'il s'agit d'une «chose ... concernant laquelle une infraction à la présente loi a été commise ou est soupçonnée avoir été commise». Nous sommes tout à fait d'accord avec le principe qui sous-tend cette interprétation, mais nous ne voyons pas l'utilité de telles acrobaties. C'est pourquoi nous recommandons que parmi les choses «saisissables» se trouve la catégorie des choses soustraites et que, au moyen d'un renvoi, cette catégorie reprenne la partie applicable de la définition des termes «biens» et «propriété».

(2) *Les profits tirés d'une infraction*

77. En common law, on a toujours insisté sur la nécessité de priver l'auteur d'un crime des profits qu'il en avait tirés. Comme ces

profits n'ont aucun propriétaire légitime, la jurisprudence a toujours reconnu à la Couronne le droit de les confisquer. Ainsi, dans certaines décisions récentes concernant la sentence, en matière de trafic de drogues, les tribunaux ont manifestement adopté cette position. Par exemple, dans l'affaire *Kotrbaty*, le juge Berger a imposé une amende afin d'enlever à l'accusé les profits qu'il avait tirés de la vente de l'héroïne[87]. Devrait-on adopter ce point de vue en matière de fouilles, de perquisitions et de saisies?

78. En réalité, il est assez rare que l'on puisse saisir les profits tirés de la perpétration d'une infraction et ce, pour plusieurs raisons. Contrairement aux biens volés, ces profits se trouvent la plupart du temps en possession de l'accusé sous forme d'argent qui, comme on le sait, n'a pas «d'odeur». De plus, contrairement à la victime d'un vol ou d'une fraude, comme la personne qui a versé cet argent est généralement impliquée dans la perpétration de l'infraction, elle n'a pas intérêt à collaborer avec la police et ainsi étaler sa turpitude. Cela ne fait qu'ajouter à la difficulté d'identifier les fonds litigieux. En fait, les seuls cas où il pourrait être possible de saisir les profits tirés d'une infraction sont ceux où un agent provocateur prend part à l'échange de fonds, comme dans le cas du trafic de drogue, ou encore ceux où l'infraction consiste précisément dans le transfert de fonds, en matière de jeu ou de pari par exemple.

79. En fait, aucune disposition légale concernant les fouilles, les perquisitions et les saisies en matière criminelle n'énonce la possibilité de saisir ou de détenir les profits tirés de la perpétration de l'infraction. Par exemple, en vertu de l'article 181 du *Code criminel*, une somme d'argent ne peut être saisie et détenue que dans la mesure où elle constitue la preuve d'une infraction en matière de jeu. Par ailleurs, dans le cas de perquisitions concernant des drogues et des stupéfiants, s'il arrive souvent que de l'argent soit saisi, soit pour sa valeur probante, soit parce qu'il constitue une «autre chose» à l'égard de laquelle une infraction a été commise, la valeur probante de cet argent doit être établie dès lors qu'une demande de restitution est présentée par le possesseur légitime[88]. Récemment, certains agents de police et représentants de la poursuite ont émis l'opinion que l'on pouvait avoir recours au mandat prévu au paragraphe 443(1) du *Code* afin de saisir les profits d'une infraction puisque la possession de ceux-ci constitue une infraction aux termes de l'article 312.

80. Il convient d'apporter quelques éclaircissements sur cette question de la saisie des profits d'une infraction. Selon nous, l'État ne devrait être admis à saisir ces profits que lorsque la loi déclare illégale la possession de ceux-ci, ou en ordonne la confiscation. À strictement

parler, du point de vue des droits de propriété, ces profits, contrairement aux choses dérobées à une personne, appartiennent à la personne soumise à la perquisition. Ainsi, dans l'affaire *Smith*, le juge Addy a même affirmé que la demande de restitution d'une somme d'argent saisie lors d'une enquête en matière de drogue mettait en jeu «un droit absolu de propriété[89]». Et contrairement au cas des choses soustraites, personne n'est lésé si le possesseur dilapide ses profits avant d'avoir été condamné. Le cas échéant, si l'État ne peut punir le coupable en le privant de ces profits, il dispose tout de même d'autres mesures sentencielles[90]. Certes, on peut soutenir que la confiscation des profits tirés d'une infraction ne devrait pas être seulement une mesure sentencielle parmi tant d'autres, et que nul ne devrait avoir le droit de conserver des biens acquis illégalement. Aux États-Unis, dans les lois concernant le crime organisé[91], on a pris des mesures visant à mettre en œuvre une telle politique au moyen d'une sorte de mécanisme de dépossession *in rem*. Cette possibilité a déjà fait l'objet de discussions au Canada[92]. Cependant, pour des raisons sur lesquelles nous reviendrons plus loin, nous estimons que ce genre de recours n'a pas sa place dans le *Code criminel*[93]. Pour ce qui est de savoir si la possession de profits résultant de la perpétration d'une infraction constitue, ou devrait constituer un crime distinct, nous préférons ne pas nous prononcer dans le cadre du présent document. En l'absence d'une telle infraction, nous maintenons que les mesures visant à récupérer les profits tirés d'une infraction ne devraient être prises qu'au stade de la sentence.

81. Pour les raisons que nous venons d'exposer, nous estimons qu'il est inutile de créer une catégorie distincte visant les «profits résultant de la perpétration d'une infraction». Dans la mesure où la possession de ces profits constitue un crime en soi, leur saisie est manifestement visée par la catégorie des «choses dont la possession, dans les circonstances de l'espèce, constitue une infraction», catégorie que nous allons maintenant aborder.

C. Les choses dont la possession, dans les circonstances de l'espèce, constitue une infraction

82. Il existe un rapport direct entre les dispositions qui prohibent la possession de certains biens, et les pouvoirs de fouille, de perquisition et de saisie. Ceux-ci assurent l'application de

celles-là. Il existe encore des cas, comme en matière de fausse monnaie, où la prohibition est liée à l'existence d'un droit de propriété exclusif de l'État[94]. Le plus souvent, cependant, la prohibition découle des dangers que comporte la possession des biens en cause. Les meilleurs exemples de cette seconde catégorie sont les lois en matière de drogues et de stupéfiants, de même que les dispositions du *Code criminel* portant sur les armes[95]. En pratique, les perquisitions et les saisies de stupéfiants sont très fréquentes et sont effectuées en vertu de divers modes d'autorisation, y compris le mandat de main-forte. Comme nous l'avons mentionné précédemment, les perquisitions visant à découvrir des armes sont également très courantes et, le plus souvent, sont effectuées sans mandat[96]. Malgré le moratoire qui a été imposé sur les demandes de mandats de main-forte, une étude effectuée par la Commission sur l'usage de ce mandat révèle que, notamment à Edmonton et à Vancouver, les mandats actuellement en vigueur sont employés couramment dans les perquisitions en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*[97].

83. Même si certains des biens saisis peuvent être utilisés comme éléments de preuve, la portée du mécanisme de saisie est beaucoup plus large. Par exemple dans le cas où la police trouverait une grande quantité de fausse monnaie, nul n'oserait prétendre que la saisie devrait être limitée à ce qui est nécessaire pour prouver la perpétration de l'infraction. En effet, comme la possession de fausse monnaie est absolument interdite, le tout devrait être confisqué. La question devient plus délicate lorsque la possession d'un objet donné n'est illégale qu'à certaines fins. Il s'agit notamment des drogues à usages restreints[98], des instruments d'effraction[99], ainsi que des publications obscènes et des histoires illustrées de crimes[100].

84. En premier lieu, comme la simple possession de ces objets ne constitue pas une infraction, la saisie n'est justifiée que dans la mesure où il existe des motifs de croire que le possesseur avait en tête le but illégal prescrit. La législation actuelle semble reconnaître cette limite. Par exemple, le paragraphe 37(2) de la *Loi des aliments et drogues*, énonce clairement qu'il doit s'agir d'une drogue «au moyen ou à l'égard de laquelle une infraction ... a été commise». Ainsi, celui qui a des amphétamines en sa possession ne commet aucune infraction tant et aussi longtemps qu'il n'a pas l'intention d'en faire le trafic.

85. En second lieu, où doit s'arrêter l'atteinte aux droits que justifie la perpétration d'une telle infraction? Autrement dit, il ne fait aucun doute qu'il est légitime de saisir les choses ou la quantité de

substance nécessaires pour prouver la perpétration de l'infraction. Mais l'accusé peut-il conserver la possession du reste? On pourrait prétendre que puisque la possession de ces choses n'est pas *en soi* illégale, rien n'autorise l'État à les saisir. Dans l'affaire *Nimbus News*, par exemple, on a fait remarquer qu'une condamnation pour avoir eu possession de revues obscènes à des fins de distribution ne rendait pas illégale la simple possession continue de ces revues[101]. En toute logique, le possesseur de drogues à usage restreint ou de revues obscènes devrait être en droit de conserver ces objets à l'exception de ceux qui sont nécessaires pour prouver la perpétration de l'infraction. Pourtant, la fausseté de ce raisonnement saute aux yeux. En effet, cela permettrait au possesseur de réaliser, au moyen des objets qui n'ont pas été saisis, les buts qu'il s'était fixés lorsque la perquisition a été autorisée.

86. Afin d'éviter une telle absurdité, nous recommandons que la portée de la saisie soit étendue à toutes les choses dont la possession constitue une infraction. Il va sans dire que, d'un certain point de vue, cela revient à conférer un caractère préventif à la saisie. Effectivement, c'est la possibilité de saisir toutes les publications obscènes qui distingue le pouvoir de perquisition à caractère préventif associé au mécanisme de dépossession *in rem*, du pouvoir traditionnel[102] que créent les dispositions de l'article 443. Cependant, ce n'est pas uniquement par mesure préventive que l'on saisit, par exemple, l'ensemble des amphétamines qu'une personne possède à des fins illégales. En pareil cas, la saisie vise aussi à empêcher la poursuite ou la répétition de l'infraction (la possession aux fins de trafic). Or, comme la possession illégale précède l'atteinte aux droits, ce mécanisme de saisie respecte le processus de réaction au crime que nous avons décrit, et qui constitue la caractéristique essentielle de notre système de procédure pénale. Signalons par ailleurs que l'absence de disposition interdisant la simple possession ne signifie pas que celle-ci est approuvée par la société. Sans doute traduit-elle plutôt la préoccupation du droit pénal de viser davantage le distributeur que le possesseur[103]. Dans ces conditions, il serait contradictoire d'autoriser la police à se livrer à des fouilles et à des perquisitions, puis à porter une accusation contre la personne soupçonnée d'être un distributeur, et de ne pas lui permettre de saisir les objets visés par la prohibition.

87. Toutefois, il ne faudrait pas en conclure que les mécanismes *in rem* que contient actuellement le *Code criminel* sont à l'abri des critiques. Nous reviendrons plus loin sur ce problème[104]. Néanmoins, il est nécessaire de reconnaître, au sein des règles

générales, le caractère légitime de la saisie portant sur l'ensemble des choses ou sur toute la substance possédée par une personne à des fins illégales. Il arrive qu'au terme du procès, l'on se rende compte que la possession était tout à fait légitime, et la saisie prend alors un caractère attentatoire. Toutefois, cette possibilité est inévitable à l'égard de toutes les catégories de choses saisissables. Par exemple, il se pourrait que l'argent saisi en tant que bien volé ait en fait été acquis de façon tout à fait honnête. Par conséquent, les garanties contre les atteintes et les saisies injustifiées doivent être d'ordre général. Elles doivent faire partie des règles de preuve et des dispositions concernant la restitution et la confiscation des choses saisies. En revanche, elles ne devraient pas empêcher la saisie de biens dont la possession est interdite dans certaines circonstances bien définies.

D. La preuve d'une infraction

88. La recherche de preuves, en tant que justification des fouilles, des perquisitions et des saisies, a toujours été mise en évidence, tant dans la jurisprudence que dans les pratiques policières, surtout en matière de perquisition avec mandat. On estime que dans plus de 80 pour cent des décisions canadiennes portant sur des mandats délivrés en vertu des dispositions de l'article 443, les dénonciations étaient fondées exclusivement sur les dispositions de l'alinéa (1)*b*) lesquelles permettent de saisir toute chose qui «fournira la preuve touchant la perpétration d'une infraction[105]». Or, les résultats de la recherche effectuée par la Commission montrent un déséquilibre encore plus marqué: parmi les 136 mandats délivrés en vertu de l'article 443 et examinés par le comité des juges, 134 étaient fondés sur les dispositions du même alinéa[106]. Par ailleurs, la recherche de preuves, à titre de justification de la fouille sans mandat concomitante de l'arrestation est établie depuis fort longtemps, cela va de soi. D'un point de vue historique, il est possible que le Canada ait agi de façon hâtive en cautionnant, en dehors du contexte de l'arrestation, les saisies avec mandat visant seulement à recueillir des preuves, et en acceptant d'emblée une forme d'atteinte à la vie privée dont le bien-fondé a été contesté par d'autres États. Quoi qu'il en soit, ce motif de perquisition est maintenant trop bien établi pour que l'on puisse sérieusement le remettre en question.

89. Dans une certaine mesure, cette justification se confond avec d'autres. En effet, les choses acquises illégalement par la

perpétration d'une infraction et celles dont la possession est interdite peuvent également avoir une valeur probante. Ainsi, lorsque l'on saisit des stupéfiants, ce n'est pas seulement parce que la possession en est interdite, mais aussi parce que la loi exige, pour que l'accusé soit trouvé coupable, que la nature de la substance saisie soit prouvée. En pratique cependant, les saisies de choses (notamment de documents) avec mandat et visant seulement à faire la preuve d'une infraction, restent les plus courantes. Si nous reconnaissons cette justification, c'est que nous admettons que même lorsque la possession est parfaitement légale, l'utilité d'une chose à titre de preuve, pour l'application du droit pénal, doit prévaloir sur les inconvénients que la saisie peut imposer au possesseur.

90. De façon générale, les tribunaux ont manifesté une certaine souplesse dans leur interprétation de ce qui constitue la «preuve» d'une infraction. Dans l'affaire *Worrall*, le juge Porter, juge en chef de l'Ontario, a explicité le critère de la façon suivante:

> [TRADUCTION]
> Selon moi, ce critère impose au juge de paix de déterminer si la production des choses est susceptible de fournir une preuve pertinente en l'espèce, et de s'assurer que dans l'éventualité d'un procès portant sur la fraude alléguée, la production de ces choses serait opportune[107].

En mettant l'accent sur la pertinence éventuelle, les tribunaux ont en fait donné à la Couronne un pouvoir discrétionnaire considérable. De façon générale, ils ont plutôt cherché, du moins au stade de la délivrance, à éviter d'approfondir la question de la *nécessité* d'enlever les choses à leur possesseur. Cette question n'a en fait été soulevée que dans des affaires telles que *Nimbus News*[108] et *Pink Triangle Press*[109], où la restitution des choses saisies avait été demandée. En réalité, il s'agit là d'un pis-aller. Tolérer la saisie de choses dont l'État n'a pas vraiment besoin pour l'application de la loi, c'est reconnaître une certaine maladresse dans l'exercice des pouvoirs de la police. En revanche, il est difficile de demander à la police de déterminer avec exactitude, au stade de la saisie, quels sont les éléments de preuve absolument nécessaires, par exemple, dans le cas où le seul élément de preuve véritablement pertinent serait enfoui dans une pile de documents sans intérêt. Quelle que soit la valeur de ce compromis, les dispositions censées lui servir de fondement ne sont pas non plus au-dessus des critiques. Ce problème relève des mécanismes postérieurs aux perquisitions et comme tel, il sera examiné dans un document de travail portant précisément sur ces mécanismes.

E. Les instruments du crime

91. Au Canada, aucun texte législatif n'autorise expressément les fouilles et les perquisitions visant les instruments ayant servi à la perpétration d'une infraction. Pourtant, l'existence de ce pouvoir est indiscutable. Les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, de même que celles de l'article 99 du *Code criminel*, permettent la saisie de choses au moyen desquelles une infraction a été commise. Par ailleurs, les dispositions de l'alinéa 443(1)*c*) du *Code* visent toute chose qui est «destinée à servir aux fins de la perpétration d'une infraction». Malgré son ambiguïté, cette expression semble faire référence non seulement à la possibilité que la chose puisse servir à des fins illégales, mais aussi à l'intention réelle du possesseur d'en faire un tel usage. En Angleterre, où il n'existe aucune disposition de portée aussi générale que celles de l'article 443 du code canadien, les «instruments» ayant servi à la perpétration d'un crime ont été considérés comme saisissables en vertu du common law[110].

92. Il semble que l'on ait peu souvent recours au mandat afin de saisir les instruments ayant servi à la perpétration d'un crime, à telle enseigne que les dispositions de l'alinéa 443(1)*c*) ne sont pour ainsi dire jamais utilisées[111]. Par contre, en matière de drogues et de stupéfiants, les instruments de l'infraction ont un intérêt particulier. En effet, la police peut avoir intérêt à saisir toute la panoplie d'instruments utilisés relativement à l'usage et au trafic de ces substances, de même qu'à la fabrication des drogues. Or, les mandats délivrés en vertu des dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* ne permettent que la saisie des stupéfiants ou des drogues et non de tels objets. C'est pourquoi il n'était fait aucune mention de telles choses dans les documents relatifs aux mandats étudiés dans le cadre de l'enquête nationale. Cependant, comme l'agent a le pouvoir de saisir ces choses une fois le mandat délivré, on retrouve parfois les «instruments du crime» énumérés dans les procès-verbaux de saisie. Parmi les objets habituellement saisis dans de tels cas, les plus fréquents sont les pipes, les balances, les couteaux, les sacs de plastique, les objets servant à fumer et les instruments de laboratoire[112].

93. Les instruments ayant servi à la perpétration d'une infraction (par exemple les accessoires liés à l'usage ou au trafic de la drogue) constituent dans la plupart des cas des éléments de preuve de l'infraction. Dans d'autres cas, celui des armes par exemple, la

simple possession peut être illégale, et l'objet peut en outre être saisi par simple mesure de précaution. Dans tous ces cas, l'État n'a pas à invoquer une justification distincte pour saisir l'instrument. La question qui se pose est alors la suivante: indépendamment de la valeur probante éventuelle de ces objets, ou du fait qu'il s'agit de choses dont la possession est illégale ou d'armes saisissables par mesure de précaution, sur quoi peut-on se baser pour saisir des instruments ayant servi à la perpétration d'une infraction? Le common law semble fournir deux réponses à cette question.

94. En premier lieu, dans toute l'histoire, on a considéré que les choses utilisées par leur propriétaire pour commettre une infraction devaient être confisquées au profit de l'État. Ce concept tire sa source de la loi médiévale du "deodand", suivant laquelle les objets telles les charrettes ou les épées ayant servi à causer des blessures à autrui étaient saisis, expropriés puis, après avoir été «purifiés», vendus par la Couronne. C'était là, au fond, imputer une certaine faute à l'objet lui-même[113]. Si cela peut sembler tenir de la mythologie, il est permis de se demander quelle est alors la raison d'être des dispositions du paragraphe 10(9) de la *Loi sur les stupéfiants*, lesquelles permettent au tribunal d'ordonner la confiscation, au profit de Sa Majesté, de tout moyen de transport utilisé pour la perpétration d'une infraction à la Loi. Dans l'affaire *Hicks*, la Cour d'appel du Manitoba a reconnu que rien ne justifiait qu'une telle mesure soit prise après la saisie et avant la déclaration de culpabilité:

> [TRADUCTION]
> Il est possible d'ordonner la confiscation de biens même si ceux-ci ne se trouvent pas en possession de la Couronne. Si l'on se départit de ces biens de telle manière qu'il soit impossible d'exécuter une ordonnance de confiscation, ce fait constitue un élément qui peut avoir un effet sur la sentence éventuellement imposée à l'auteur de l'infraction[114].

Or, en toute logique, s'il n'existe aucune raison de permettre à la Couronne de détenir un moyen de transport saisi jusqu'à ce qu'une ordonnance de confiscation ait été prononcée, on voit mal pourquoi on en permettrait la saisie, à moins qu'il n'ait une valeur probante. Encore une fois, soulignons que les principes fondamentaux en matière de sentence, qu'il s'agisse de punition ou de dissuasion, ne sauraient entrer en ligne de compte pour justifier les fouilles, les perquisitions et les saisies préalables au procès.

95. Le second principe sous-jacent aux pouvoirs de saisir les instruments ayant servi à la perpétration d'une infraction est d'ordre préventif. Du reste, c'est là l'essence même des dispositions de

l'alinéa 443(1)*c*). On peut d'abord reprocher à ce principe de n'être pas conforme au schéma suivant lequel l'application du droit pénal doit suivre la perpétration de l'infraction, schéma que nous avons adopté en vue de restreindre les atteintes à la vie privée. D'ailleurs, ces dispositions montrent elles-mêmes l'arbitraire et l'incertitude que peut entraîner la moindre dérogation à ce schéma. Certains appareils, comme le matériel servant à la fabrication de la fausse monnaie, peuvent *a priori* être considérés comme destinés à des fins criminelles. Il en va tout autrement d'une multitude d'objets inoffensifs en eux-mêmes qui peuvent être destinés «à être utilisés aux fins de la perpétration d'une infraction». Ainsi, on peut tuer avec un couteau de cuisine, confectionner un faux avec un crayon, fabriquer une drogue illégale dans une éprouvette, et ainsi de suite.

96. Par conséquent, nous estimons que l'interdiction légale constitue la seule façon appropriée de réglementer la possession des choses intrinsèquement dangereuses. En l'absence de telles prohibitions, le citoyen ne devrait pas être exposé, tant et aussi longtemps qu'une ordonnance de confiscation ou une sentence n'a pas été prononcée contre lui, à se voir privé de choses dont il est le propriétaire légitime, à cause de l'usage illégal qu'il pourrait éventuellement en faire. Il y aurait peut-être lieu de déroger à cette règle dans le cas des armes susceptibles de mettre la sécurité et la vie humaine en danger. Nous examinerons cette question un peu plus loin[115]. Mais de façon générale, nous recommandons l'exclusion des «instruments du crime» de la définition des choses «saisissables».

F. Les personnes illégalement détenues

RECOMMANDATION

3. Outre leurs pouvoirs concernant les choses «saisissables», les agents de la paix devraient être habilités à effectuer des perquisitions en vue de délivrer des personnes détenues dans des circonstances constituant une infraction.

97. En plus des choses et des renseignements que l'État peut souhaiter obtenir, il arrive parfois que l'objet de la perquisition soit une personne. En général, lorsque la police désire placer une personne sous sa garde, c'est qu'elle la soupçonne d'avoir participé à la perpétration d'une infraction, et cherche à l'arrêter. Dans certains

cas cependant, il peut s'agir d'une autre raison: la personne peut être détenue illégalement par une autre personne. En vertu du *Code* actuel, les crimes de détention illégale comprennent l'enlèvement et la séquestration[116], de même que le détournement d'aéronef[117]. Dans ce cas, l'intervention du policier a pour but de délivrer la personne et non de l'arrêter.

98. À l'heure actuelle, les dispositions de l'article 182, qui porte sur les femmes détenues dans les maisons de débauche, sont les seules dispositions du *Code* concernant les perquisitions en matière criminelle qui reconnaissent cette justification. En revanche, celle-ci figure en termes explicites dans un certain nombre de lois provinciales, notamment dans la législation concernant le bien-être des enfants[118]. Par ailleurs, le *Code de l'A.L.I.* reconnaît que les personnes [TRADUCTION] «qui sont illégalement gardées en réclusion ou qui subissent une autre atteinte à leur liberté doivent être considérées comme pouvant faire l'objet d'une perquisition et d'une saisie[119]». En outre, les "American Federal Rules" ont été modifiés récemment de façon à autoriser les mandats de perquisition visant des personnes[120].

99. Dans ces conditions, comment peut-on expliquer l'absence de telles dispositions dans le *Code criminel*? Il se pourrait bien que le législateur ait tout simplement jugé inutile d'en adopter. Jusqu'à un certain point en effet, les tentatives de délivrance pourraient bien être autorisées dans la mesure où elles sont concomitantes de l'arrestation du délinquant. À la lumière de la décision rendue dans l'affaire *Eccles* c. *Bourque*, il est clair que dans ce cas, l'agent n'est pas tenu d'avoir un mandat en sa possession pour entrer dans des lieux privés en vue d'y effectuer une arrestation[121]. De plus, les agents de la paix sont investis, en vertu du common law, du pouvoir résiduel de faire régner l'ordre public, ce qui leur permet de pénétrer sans mandat dans un lieu pour empêcher la perpétration d'une infraction de nature à causer directement des blessures graves à autrui[122]. Cependant, les autorités policières ont fait part aux recherchistes de la Commission de leur réticence à agir sans autorisation écrite dans des cas semblables. En outre, dans le cas d'une infraction prévue par le *Code criminel* comme l'enlèvement, il peut arriver que la personne soit détenue à un autre endroit que celui où se trouve le kidnappeur.

100. C'est pourquoi nous recommandons que les agents de la paix soient expressément habilités à perquisitionner en vue de délivrer toute personne illégalement détenue. À cause des distinctions qui existent, aussi bien en théorie qu'en pratique, entre un tel pouvoir et les pouvoirs de fouille, de perquisition et de saisie

relatifs aux choses, aux fonds et aux renseignements, nous proposons que le pouvoir de perquisition et de délivrance soit traité de façon distincte et ne soit pas intégré à la définition des choses «saisissables». Toutefois, comme dans le cas des pouvoirs de fouille, de perquisition et de saisie, l'illégalité de la détention devrait être liée à la perpétration d'une infraction criminelle. Autrement, ce pouvoir pourrait éventuellement se confondre avec le bref d'*habeas corpus*. Ce bref est délivré par une cour supérieure et vise à déterminer la légitimité de diverses formes de détention, y compris l'incarcération de personnes attendant leur procès ou leur expulsion, l'internement des malades mentaux et la garde des enfants. Dans bon nombre de ces cas, l'illégalité de la détention tient beaucoup plus souvent à une irrégularité sur le plan de la procédure qu'à la perpétration d'une infraction par le soi-disant gardien. Au début de cette étude, nous avons posé comme postulat que les perquisitions et les saisies devaient constituer la réaction du droit pénal à la perpétration d'une infraction. En conséquence, il serait illogique de permettre le recours à un pouvoir de perquisition dans les cas que nous venons d'énumérer.

CHAPITRE SIX

Les exceptions à l'exigence générale du mandat

RECOMMANDATION

4. Sauf indication contraire, l'agent de la paix ne devrait être habilité à procéder à une fouille, à une perquisition ou à une saisie visant des choses «saisissables» qu'avec un mandat. Cependant, un mandat ne devrait pas être requis:

- **a) lors d'une fouille ou d'une perquisition effectuée avec le consentement de la personne concernée, conformément aux recommandations 5 et 6;**
- **b) lors d'une fouille, d'une perquisition ou d'une saisie concomitante d'une arrestation, conformément aux recommandations 7 et 8;**
- **c) lors d'une fouille, d'une perquisition ou d'une saisie effectuée dans des circonstances présentant un danger pour la vie humaine ou la sécurité, conformément à la recommandation 9;**
- **d) lors d'une perquisition effectuée dans un véhicule automobile, dans des circonstances où une chose «saisissable» peut être perdue ou détruite, conformément à la recommandation 10; et**
- **e) lors de la saisie d'une chose «saisissable» bien en vue, conformément à la recommandation 30.**

101. Lorsque nous avons défini les diverses catégories de choses «saisissables», nous avons identifié les situations où est justifiée l'atteinte à la vie privée que constitue la fouille, la

perquisition ou la saisie. Il nous faut maintenant définir les mécanismes devant servir à autoriser les fouilles, les perquisitions et les saisies. Dans ce domaine, la règle fondamentale veut que, sauf indication contraire, l'agent de la paix soit muni d'un mandat pour pouvoir se livrer à une fouille, à une perquisition ou à une saisie. Dans le présent chapitre, nous tenterons d'établir les exceptions à cette règle générale. Comme nous l'avons déjà expliqué, nous maintenons qu'il existe essentiellement deux types de situations qui justifient une fouille, une perquisition ou une saisie sans mandat: celles où l'obtention d'un mandat n'est pas nécessaire, et celles où l'obtention d'un mandat est impraticable ou matériellement impossible[123].

102. Essentiellement, le critère de la «non-nécessité» est fonction du caractère attentatoire des fouilles, des perquisitions et des saisies. Il s'ensuit que lorsque la recherche d'objets, de fonds ou de renseignements ne comporte aucune atteinte à la liberté individuelle, il est inutile de conférer à la police une autorisation expresse. Par exemple, lors d'une enquête portant sur un meurtre commis dans un endroit public, la police n'a besoin d'aucune autorisation particulière pour se rendre sur les lieux, prendre des photographies et recueillir des éléments de preuve matérielle. En revanche, une telle autorisation devient indispensable lorsque la preuve d'un crime se trouve dans une maison privée, puisque le fait de pénétrer dans la maison constitue une atteinte à la vie privée de l'occupant. Toutefois, il est reconnu en droit que ce dernier peut consentir à l'introduction. Une fois le consentement donné, l'introduction perd son caractère attentatoire. Les recommandations 5 et 6 traitent de cette exception à l'exigence générale du mandat.

103. Quant au critère de l'«impraticabilité» (ou de ce qui est matériellement impossible), il est lié à l'urgence de la situation. À l'heure actuelle, ce critère est reconnu, implicitement du moins, à l'égard de toute une gamme de pouvoirs de perquisition sans mandat: la perquisition concomitante de l'arrestation suivant le common law et les dispositions législatives concernant les armes à feu, les stupéfiants et les drogues. Pour ce qui est de savoir si cette gamme recouvre de façon appropriée tous les types de situations urgentes, cette question exige un examen approfondi depuis longtemps. Selon notre propre étude, il existe trois catégories de situations urgentes où il y a lieu de faire exception à l'exigence générale du mandat: l'arrestation, le risque pour la vie humaine ou la sécurité, et le risque de perte ou de destruction de choses saisissables. Nous traitons de ces trois types de situations dans les recommandations 7 à 10.

I. Le consentement

RECOMMANDATIONS

5. L'agent de la paix devrait être autorisé à fouiller sans mandat:

a) toute personne qui consent à être fouillée, et

b) tout endroit ou véhicule, avec le consentement d'une personne présente qui a manifestement qualité pour consentir à la perquisition.

L'agent de la paix devrait être habilité à saisir toute chose «saisissable» découverte au cours d'une fouille ou d'une perquisition de consentement.

6. Le consentement devrait être consigné sur un document informant la personne de son droit de refuser de se soumettre à la fouille ou à la perquisition, et de révoquer son consentement en tout temps. L'absence d'un document dûment rempli devrait constituer une preuve suffisante à première vue de l'absence de consentement.

A. La nécessité d'imposer certaines limites

104. Selon nous, ces recommandations répondent aux lacunes des règles de droit actuelles concernant les fouilles et les perquisitions de consentement[124]. Les avantages du recours au consentement comme mode d'autorisation des fouilles, des perquisitions et des saisies sont nombreux: la réduction des possibilités de contestation, l'acquisition éventuelle d'un avantage psychologique sur la personne fouillée, les règles beaucoup plus souples sur le plan de la procédure, et la non-application du critère habituel des «motifs raisonnables[125]». Toutefois, si l'existence d'une coopération véritable entre les agents de la paix et les particuliers doit être sanctionnée par le droit, la question du consentement doit être replacée dans le contexte de common law dont elle semble s'être dégagée au cours de l'histoire. En effet, il est important de reconnaître que la fouille ou la perquisition «de consentement» constitue l'une des méthodes dont dispose la police, plutôt qu'un acte à caractère purement privé échappant à la compétence du législateur. Cette position a été adoptée dans le *Criminal Investigation Act*[126]

proposé par la Commission de réforme du droit de l'Australie, ainsi que dans le *Model Code of Pre-Arraignment Procedure*[127] de l'"American Law Institute". Elle reflète également l'expérience pratique qui démontre que le consentement constitue, pour les policiers, un outil au même titre que les pouvoirs coercitifs: il leur permet d'accomplir leur tâche lorsqu'il s'agit de fouiller un suspect[128].

105. Dans la mesure où il encourage le recours au consentement, en tant que mode d'autorisation, le droit contribue à la réalisation de certains objectifs d'ordre politique. L'un des principes fondamentaux dans ce domaine, c'est-à-dire la reconnaissance de la subordination des enquêtes policières à la coopération des citoyens, bénéficie de l'approbation générale au Canada. Comme l'a fait remarquer le Comité Ouimet, «la police ne peut s'acquitter *efficacement* de ses fonctions de gardienne de l'ordre si elle ne jouit pas de l'appui et de la confiance du public[129]». Si cette affirmation milite, ne serait-ce qu'en partie, en faveur de la nécessité d'une certaine harmonie entre les méthodes de la police et les valeurs de la collectivité, afin d'assurer la collaboration du public, elle a également une incidence sur l'orientation des règles de procédure: il s'agit d'encourager les policiers à obtenir la collaboration des citoyens plutôt que de recourir à l'application autoritaire de pouvoirs coercitifs.

106. Cependant, le système de police fondé sur le consentement présente d'importantes limites. Ainsi, certains auteurs américains se sont dits d'avis qu'un tel système pourrait avoir pour effet d'entraver les méthodes et les enquêtes de la police:

> [TRADUCTION]
> L'obtention du consentement permet souvent aux policiers d'éviter les efforts de réflexion et de rédaction, ainsi que les déplacements qu'implique l'obtention d'un mandat de perquisition. Dans ces conditions, si le consentement est refusé, l'acte de la police a néanmoins pour effet d'avertir la personne des soupçons qui pèsent sur elle. Cela se traduit généralement, soit par la provocation volontaire d'une situation urgente, ce qui est très mal vu par les tribunaux, soit par la destruction des éléments de preuve par le malfaiteur alerté. Ni l'un ni l'autre de ces résultats n'est souhaitable[130].

L'agent de la paix doit donc, cela va de soi, s'assurer que la personne est susceptible de donner son consentement, avant de chercher à obtenir le collaboration de celle-ci. Il n'en reste pas moins que dans la mesure où l'obtention du consentement constitue une solution plus facile que l'obtention d'un mandat, la loi dissuade le policier

d'obtenir un mandat dans les cas où il serait approprié de le faire. Pourtant, en pratique, les policiers présentent souvent des demandes de mandats, pour le cas où le consentement serait refusé[131].

107. Mais ce qui importe plus encore, le recours systématique au consentement à titre de mode d'autorisation pourrait en réalité nuire à la collaboration du public avec la police s'il prenait la forme d'une espèce de terrorisme plutôt que d'une collaboration véritable. Ainsi, un criminaliste canadien chevronné a fait la remarque suivante: [TRADUCTION] «Dans bien des cas, l'irrespect dont font preuve les criminels envers l'autorité peut en grande partie être imputé aux premiers contacts de ces personnes avec la police, qui leur ont inspiré de la crainte plutôt que de la confiance et du respect[132]». Reprenant ce commentaire, le Comité Ouimet a insisté sur le caractère équitable que doivent avoir les règles régissant les contacts de la police avec les délinquants[133]. Dans le cadre des fouilles et des perquisitions «de consentement» visées par le présent document, c'est pour les mêmes raisons que nous préconisons l'intégration de règles et de principes directeurs visant à assurer que l'usage de cette exception à l'exigence générale du mandat soit limité aux cas qui le justifient.

108. Cette position peut sembler ajouter inutilement à la difficulté de la tâche de la police. En effet, dans la mesure où une personne consent à ce que l'agent s'introduise chez elle ou se livre à une fouille sur sa personne, pourquoi devrait-on imposer des contraintes supplémentaires à l'agent de la paix du seul fait de sa profession? La raison en est qu'il est faux de mettre sur le même pied le cas où un agent de la paix demande la permission de s'introduire dans un lieu, d'y effectuer des perquisitions, de fouiller des personnes et d'emporter les objets ainsi trouvés, et celui où une demande de même nature est formulée par un simple citoyen. Les agents de la paix ne font pas qu'exercer des pouvoirs particuliers; ils ont un statut spécial qui impose le respect. En conséquence, le citoyen aux prises avec la police peut ressentir une certaine intimidation. Or, comme le consentement obtenu par l'exercice de l'autorité est une illusion, il est toujours possible que la collaboration ne soit pas tout à fait volontaire[134].

109. En outre, l'on pourrait croire que cette position s'écarte de la tendance jurisprudentielle récente au Canada. En effet, dans divers contextes, les tribunaux ont considéré comme volontaire le fait pour un citoyen d'obtempérer à la demande d'un agent de la paix, et ce, malgré l'exercice, par ce dernier, de son autorité. Par exemple, depuis l'affaire *Chromiak*, il semble reconnu que le fait de fournir un

échantillon d'haleine, à la demande de l'agent de la paix, peut être considéré comme volontaire[135]. Cependant, les tribunaux canadiens se sont toujours bornés à déterminer le caractère volontaire d'un acte particulier à la lumière des faits de chaque cas. Quoi qu'il en soit, cela n'empêche pas d'établir des règles précises pour régir les activités de la police. À ce propos, signalons que dans l'affaire *Chromiak*, l'acte du policier, qui consistait à demander un échantillon d'haleine, était prévu par une disposition du *Code criminel*[136].

110. Il est peut-être opportun de souligner que le consentement à la fouille, à la perquisition ou à la saisie prend toute son importance, sur le plan juridique, dans les cas où il n'existe pas de motifs justifiant un acte unilatéral de la part de l'agent de la paix, ou lorsque la procédure visant à autoriser cet acte n'a pas été suivie. S'il arrive qu'un agent de la paix tente, pour des raisons stratégiques, d'obtenir le consentement de la personne dans un cas où il serait par ailleurs fondé à passer outre au refus de la personne, il est faux de considérer, en pareil cas, le consentement comme le fondement de la fouille, de l'introduction, de la perquisition ou de la saisie. En réalité, le consentement devient alors un outil facilitant un acte que l'agent de la paix est au demeurant habilité à accomplir dans l'exercice de ses pouvoirs. On aurait tort de voir dans nos recommandations l'intention d'empêcher les agents de la paix de rechercher le consentement des personnes concernées dans des cas semblables. En fait, nos recommandations visent plutôt les cas où l'obtention du consentement est le seul moyen dont dispose le policier pour procéder à une fouille ou à une perquisition. Dans des situations de cette nature, les citoyens sont protégés par les dispositions générales de la loi en matière pénale et en matière délictuelle traitant des atteintes aux droits privés. Dans la mesure où elles reposent sur la crainte et le manque d'information, et portent atteinte à ces droits, les activités de la police fondées sur le «consentement» battent en brèche ces mécanismes de protection.

111. Le dernier argument militant en faveur de l'établissement de limites dans la loi résulte de la position que nous avons expliquée ci-dessus. En effet, eu égard à la prohibition des «fouilles, perquisitions et saisies abusives» inscrite dans l'article 8 de la *Charte canadienne des droits et libertés*, il y a lieu de codifier les règles régissant les fouilles, les perquisitions et les saisies, de façon qu'elles soient conformes au critère constitutionnel[137]. En effet, malgré le consentement de la personne concernée, l'atteinte portée aux droits de celle-ci par l'agent de la paix constitue tout de même une fouille, une perquisition ou une saisie. Cette position est analogue à celle que

certains auteurs américains ont adoptée, et suivant laquelle les actes faits «de consentement» demeurent des cas [TRADUCTION] «d'atteintes portées sans mandat par l'État, lesquelles restent néanmoins soumises au ... critère des motifs raisonnables» formulé dans le quatrième amendement de la Constitution américaine[138]. Au Canada, il appartient maintenant à la jurisprudence de déterminer si le critère de l'article 8 de la *Charte* s'applique aux fouilles et aux perquisitions «de consentement», et le cas échéant, quelles en sont les modalités d'application. Cependant, il est permis de penser que le consentement vraiment volontaire et obtenu de façon licite contribue à établir, à première vue du moins, le caractère raisonnable de la fouille, de la perquisition ou de la saisie.

B. Le caractère «volontaire»

112. Pour être valide, le consentement doit être «volontaire». Cela entraîne l'application de critères légaux qui relèvent de domaines tout à fait différents de celui des fouilles, des perquisitions et des saisies. Les plus intéressants de ces critères, aux fins de la présente étude, sont ceux qui s'appliquent aux aveux et à l'interception des communications privées. L'étude de ces différents critères montre que le degré et la nature du «caractère volontaire» exigé par la loi diffèrent suivant les contextes.

113. Le critère applicable aux aveux a été formulé de la façon suivante dans l'affaire *Ibrahim*:

> [TRADUCTION]
> C'est une règle formelle du droit criminel anglais depuis longtemps établie qu'aucune déclaration d'un accusé n'est recevable contre lui à titre de preuve, à moins que l'accusation ne prouve qu'il s'agit d'une déclaration volontaire; c'est-à-dire qui n'a pas été obtenue par crainte d'un préjudice ou dans l'espoir d'un avantage dispensé ou promis par une personne ayant autorité. Ce principe remonte à Lord Hale[139].

Cette règle a été reprise par la Cour suprême du Canada dans l'affaire *Boudreau*, dans laquelle le juge Rand a parlé du [TRADUCTION] «doute que les circonstances dans lesquelles la déclaration est faite font naître sur la véracité de la celle-ci[140]».

114. Par contre, dans l'affaire *Goldman*[141], la Cour suprême du Canada a refusé d'appliquer ce critère aux dispositions de l'alinéa

178.11(2)*a*) du *Code criminel*, lesquelles permettent l'interception d'une communication privée avec le consentement de l'un des interlocuteurs. Suivant les motifs de la majorité, l'incitation ou la contrainte qui peuvent nuire à la véracité d'une déclaration ne sauraient avoir le même effet sur le contenu d'une communication privée interceptée. C'est donc dire que:

> Le consentement ne doit pas être obtenu par l'intimidation ou la force ou des menaces d'employer la force de la part de la police, mais on ne peut conclure à la coercition, dans le sens où le terme s'applique ici, simplement parce que le consentement est donné par suite de la promesse ou de l'espoir d'une indulgence ou de l'immunité de poursuites. Des incitations de cette nature ou la contrainte résultant de menaces de poursuites rendront inadmissible une confession ou une déclaration faite par un prévenu à des personnes ayant autorité parce que la confession ou déclaration pourrait être touchée ou influencée par l'incitation ou la contrainte. Des considérations différentes entrent en jeu cependant lorsqu'il s'agit d'un consentement de la nature de celui examiné ici[142].

Cette affirmation concorde avec la décision rendue à la même époque dans l'affaire *Rosen* c. *La Reine*, dans laquelle il était question non pas du consentement à l'interception, mais du consentement à la recevabilité en preuve de la communication interceptée. Dans cette affaire, la Cour a fait remarquer notamment que la nature de la preuve était déjà «fixée et déterminée[143]». Cette remarque a été citée par le juge MacIntyre dans l'affaire *Goldman*[144].

115. Qu'en est-il du consentement à la fouille ou à la perquisition? Les motifs formulés par la Cour suprême du Canada dans l'affaire *Rosen* semblent s'appliquer aussi bien au domaine des fouilles, des perquisitions et des saisies qu'à celui de l'interception des communications. En effet, comme la nature des éléments de preuve qui peuvent éventuellement être saisis est déjà «fixée et déterminée», on se saurait craindre que la véracité des éléments de preuve soit viciée par la contrainte ou l'incitation. Pourtant, d'autres facteurs que la fiabilité des éléments de preuve entrent en jeu dans le domaine des fouilles, des perquisitions et des saisies de consentement. En outre, nous attachons une grande importance au fait que les droits privés de la personne concernée ne doivent pas devenir illusoires. Bien qu'il appartienne à la jurisprudence de trancher cette question en dernier ressort, nous estimons qu'il irait à l'encontre des principes que nous avons élaborés dans la présente étude de considérer comme volontaire l'acquiescement obtenu par l'incitation, les menaces ou la manipulation.

C. Le consentement écrit

116. Nos propositions à ce sujet s'écartent des différentes approches traditionnelles suivant lesquelles le caractère volontaire du consentement devait être déterminé à la lumière des faits de chaque cas. C'est notamment la position qu'a adoptée la Cour suprême des États-Unis:

> [TRADUCTION]
> Le caractère volontaire est une question de fait qui doit être déterminée d'après toutes les circonstances. Et si le fait que la personne connaisse son droit de refuser est un facteur qui doit être pris en considération, le ministère public n'est pas tenu de démontrer cette connaissance pour que le consentement soit considéré comme volontaire[145].

Toutefois, bien que cette position puisse être acceptable, en tant que règle fondamentale, lorsqu'il s'agit pour le tribunal de statuer *a posteriori* sur la validité du consentement, nous estimons qu'il y a lieu de réglementer les rapports entre la police et les citoyens en cause. En outre, cette approche ne tient pas compte des difficultés de preuve importantes qui se posent lors de la reconstitution, au procès, de l'incident lié à la fouille ou à la perquisition. Nos recommandations visent à régler ces problèmes, du moins en partie.

117. La mise en garde et la formule de consentement écrites visent à réglementer l'obtention du consentement et à lui donner un caractère systématique, en informant le citoyen de son droit de refuser de se soumettre à la fouille ou à la perquisition, et en lui conférant un certain droit de regard sur les personnes qui peuvent porter atteinte à ses droits et sur les circonstances dans lesquelles elles peuvent le faire. On a observé que les Canadiens ont généralement peu tendance à mettre en doute le bien-fondé des actes de la police[146]. Ainsi, le citoyen auquel l'agent de la paix demande la permission de le fouiller, ou d'effectuer une perquisition dans son véhicule ou dans sa maison, sera naturellement enclin à tenir pour acquis que la décision de la police de procéder à une fouille ou à une perquisition est bien fondée en droit. Ce serait cautionner le recours à la ruse, de la part de la police, que de permettre que la légalité de la fouille ou de la perquisition puisse être fondée exclusivement sur de telles suppositions. À cet égard, il faut bien reconnaître que le citoyen moyen a une connaissance très limitée de la complexité des règles de droit en matière de fouilles, de perquisitions et de saisies. En conséquence, le citoyen peut bien ne pas se rendre compte que la légalité de l'acte de la police repose exclusivement sur son

consentement. Aussi nos recommandations ont-elles pour but de rendre la situation claire pour toutes les parties. Et la meilleure façon d'atteindre ce but reste encore la mise en garde imprimée sur la formule de consentement. Par ailleurs, cela évite d'imposer une charge de preuve personnelle à l'agent de la paix.

118. En outre, la formule écrite fournit une preuve probante de l'existence du consentement. Dans bon nombre d'initiatives récentes en matière de réforme du droit prises par différentes autorités, on a reconnu les difficultés de preuve que soulève le consentement. On considère qu'il est souhaitable de simplifier cette question, non seulement dans l'intérêt du citoyen soumis à la fouille ou à la perquisition, lequel peut désirer connaître ses droits en vue d'une contestation éventuelle, mais également du point de vue de l'agent de la paix. En effet, cela lui permettrait de décider en connaissance de cause s'il peut agir en vertu du seul consentement de la personne, et de répondre à toute attaque subséquente. C'est pourquoi, en Angleterre, la "Royal Commission on Criminal Procedure" a proposé que [TRADUCTION] «par mesure de protection pour les agents de la paix», ceux-ci soient tenus d'obtenir un consentement écrit de la personne visée[147].

119. Malgré l'absence de toute exigence légale à cet effet, diverses forces de police semblent avoir adopté des directives de nature administrative concernant l'usage de formules et de mises en garde écrites en ce qui a trait à l'obtention du consentement[148]. Signalons également que même si les dispositions du *Code criminel* n'exigent aucun document relativement à l'interception des communications électroniques, les experts dans ce domaine, de même que les manuels d'instructions destinés aux policiers, recommandent à ces derniers d'obtenir le consentement écrit des personnes visées[149].

120. Il est bien sûr possible d'invoquer de nombreux arguments à l'encontre de l'exigence du consentement et de la mise en garde écrits. Toutefois, nous ne croyons pas que ces arguments aient suffisamment de poids pour réfuter nos recommandations. De nombreux policiers ont fait part à nos recherchistes de leur mécontentement à l'idée d'un surcroît de paperasserie. Cependant, il est à noter que pour peu que la formule utilisée soit appropriée, la seule personne tenue de donner des renseignements serait celle qui est soumise à la fouille ou à la perquisition. En outre, certains agents de police semblaient craindre que le fait d'exiger une confirmation écrite du consentement puisse effrayer la personne concernée et l'inciter à révoquer son consentement. Pourtant, certains respon-

sables ont admis que l'obtention du consentement verbal pouvait comporter une certaine part de contrainte. À cet égard, nous optons pour la position d'autres représentants des forces de police, selon lesquels l'obtention du consentement écrit soulève peu de difficultés dans le cas où la personne est vraiment disposée à coopérer. Nous reconnaissons qu'il peut être impossible, dans certains cas, d'avoir recours à la formule écrite. C'est pourquoi celle-ci doit être considérée comme un outil aux fins d'établir le caractère volontaire du consentement, et non comme une règle inflexible.

121. Enfin, nous sommes bien conscients du fait que les règles de droit peuvent avoir un effet limité lorsqu'il s'agit d'assurer le respect des policiers envers la décision d'un citoyen de ne pas collaborer à une enquête. D'après les observations pratiques qui ont été faites en matière de fouilles et de perquisitions de consentement au Canada, de même que les études sur les effets d'exigences analogues concernant la mise en garde obligatoire lors de l'interrogatoire faisant suite à une arrestation aux Etats-Unis, il est permis de s'interroger sur le degré de protection réelle que les règles que nous préconisons peuvent fournir dans la pratique quotidienne. Quoi qu'il en soit, la possibilité d'un succès pratique limité ne devrait pas nous dissuader de prendre toutes les mesures possibles à l'heure actuelle. Si, une fois mis en œuvre, le mécanisme du consentement écrit devait se révéler inefficace, nous reconnaissons qu'il y aurait lieu de s'interroger sur son utilité.

122. Parmi les différentes initiatives récentes en matière de réforme du droit, les modalités et les effets de l'obtention du consentement écrit varient quelque peu d'une proposition à l'autre. Par exemple, la Commission Marin a recommandé que le consentement aux perquisitions effectuées par les inspecteurs des Postes canadiennes soit donné par écrit[150]. Par ailleurs, la Commission royale britannique a recommandé que le consentement soit consigné dans le carnet de notes de l'agent de la paix et signé par la personne visée[151]. En fait, par mesure de prudence, certains agents de la paix canadiens ont adopté cette façon de procéder, et ce, en l'absence de toute exigence légale. La Commission de réforme du droit de l'Australie a étudié cette question de façon complète et particulièrement convaincante:

> [TRADUCTION]
> Bien que nous ne souhaitions pas multiplier indûment le nombre de documents que les agents de police doivent avoir en leur possession, nous estimons que la protection des droits en cause est suffisamment importante pour justifier que le consentement qui sert de fondement à la

perquisition effectuée par le policier soit pris par écrit. L'absence du consentement écrit établirait, jusqu'à preuve du contraire, que la mise en garde n'a pas été faite et que le consentement n'a pas été obtenu[152].

Nous recommandons l'adoption, au Canada, d'un mécanisme semblable à celui qui a été instauré en Australie.

II. L'arrestation

RECOMMANDATIONS

7. L'agent de la paix devrait être habilité à fouiller une personne qui a été arrêtée si cette fouille constitue une précaution raisonnable dans les circonstances. La portée de ce pouvoir devrait également s'étendre aux endroits qui sont à la portée de la personne arrêtée au moment de la fouille.

8. Outre les choses «saisissables», l'agent de la paix qui arrête une personne devrait être habilité à saisir:

a) tout ce qui est nécessaire à l'identification de la personne arrêtée; et

b) toute arme ou autre objet qui pourrait permettre à la personne arrêtée de s'échapper ou de mettre en danger la vie ou la sécurité de l'agent de la paix ou d'une tierce personne, ou encore sa propre vie ou sa propre sécurité.

123. Le pouvoir de fouiller sans mandat une personne lors de l'arrestation de celle-ci est un outil précieux, voire nécessaire. Il se justifie au regard d'un certain nombre de facteurs, très bien résumés par le juge Hugessen dans l'affaire *Laporte*: [TRADUCTION] «rendre l'arrestation efficace, assurer la conservation des éléments de preuve et prévenir la perpétration d'une autre infraction[153]». Outre la jurisprudence sur ce point, les dispositions des sous-alinéas 450(2)*d*)(ii) et (iii) du *Code criminel* sanctionnent implicitement la légitimité des fouilles effectuées dans ce contexte. Ces dispositions permettent à l'agent de la paix d'arrêter une personne sans mandat pour une infraction relativement mineure, en vue soit d'obtenir ou de préserver des éléments de preuve, soit de prévenir la perpétration subséquente d'une infraction de même nature ou différente, plutôt que de la contraindre à comparaître par voie de citation.

124. Les problèmes que soulève ce pouvoir concernent les limites qu'il devrait comporter, le cas échéant. À cet égard, nous avons abordé trois questions dans notre recommandation: (1) la fouille doit-elle être autorisée automatiquement du fait de l'arrestation, ou doit-elle être justifiée par d'autres circonstances? (2) quelle devrait être la portée légale de la fouille? et (3) quelle devrait être la portée légale de la saisie?

A. La fouille devrait-elle être autorisée automatiquement du fait de l'arrestation?

125. En théorie, le droit canadien ne semble autoriser la fouille concomitante de l'arrestation que si elle constitue une précaution raisonnable dans les circonstances. Cette position tire sa source de deux décisions importantes datant du dix-neuvième siècle: *Leigh* v. *Cole*[154] et *Bessel* v. *Wilson*[155]. Bien que ces arrêts laissent entendre qu'il pourrait exister des cas d'arrestation où la fouille d'une personne ne serait pas justifiée, les tribunaux canadiens se sont montrés nettement réticents à déclarer illégales les fouilles concomitantes de l'arrestation. Il est alors permis de mettre en doute l'utilité de l'exigence du caractère raisonnable ajoutée par les autorités britanniques. Autrement dit, dès lors qu'il existe des motifs suffisants pour justifier l'arrestation, la police ne devrait-elle pas être autorisée automatiquement à fouiller la personne arrêtée?

126. Au premier coup d'œil, cette position présente l'avantage d'être simple et logique, surtout lorsque l'arrestation est considérée comme l'étape initiale du processus aboutissant à l'incarcération de la personne arrêtée. Pourtant, il est faux de confondre tous les cas d'arrestation et de leur attribuer d'emblée tous les facteurs qui caractérisent l'arrestation avec mise sous garde. L'agent de la paix agissant en vertu des dispositions de l'article 450 du *Code criminel* est fondé à arrêter une personne soupçonnée d'avoir commis une infraction relativement mineure, comme la conduite dangereuse[156], puis, après avoir vérifié son identité, à la libérer en lui remettant une citation à comparaître aux termes de l'article 452. On peut difficilement soutenir que dans un cas semblable, l'opportunité de procéder à une fouille serait la même que dans le cas d'un vol qualifié, par exemple, lors de l'arrestation du suspect après une chasse à l'homme.

127. On a reconnu cette distinction dans le *Code de l'A.L.I.*, lequel prévoit ce qui suit:

[TRADUCTION]
Les fouilles, les perquisitions et les saisies prévues par d'autres dispositions du présent Code ne doivent pas être autorisées si l'arrestation concerne une accusation d'avoir commis une «violation» ... ou une infraction en matière de circulation, ou une autre infraction mineure, dont les éléments et les circonstances ne comportent pas la possession illégale d'un objet, ni une conduite violente ou rendue dangereuse volontairement ou par négligence[157] ....

Toute définition exacte du pouvoir de fouiller une personne lors de l'arrestation de celle-ci doit tenir compte des possibilités de modification des structures actuelles de l'arrestation et, surtout, de la classification des infractions[158]. Par ailleurs, nous sommes d'avis que le principe sous-jacent aux dispositions du *Code de l'A.L.I.* est bien fondé. Suivant ce principe, le pouvoir de fouiller une personne lors de l'arrestation de celle-ci n'est pas automatique ni applicable à tous les cas.

128. On peut formuler à l'encontre de la position traditionnelle une autre critique qui se situe à un niveau plus théorique. Assimiler la fouille à l'arrestation revient à confondre les objets qui distinguent ces deux pouvoirs. En effet, la fouille a pour objet de mettre sous la main de la justice des objets, des fonds ou des renseignements, alors que l'arrestation a pour objet de placer une personne sous surveillance. Il est donc absurde d'affirmer que ces deux objets vont automatiquement de pair, et encore plus d'ériger cette affirmation en règle de droit. Il ne s'agit pas de savoir à quel moment la liberté et la dignité d'un citoyen ont été suffisamment bafouées pour permettre une fouille sans mandat de sa personne ou des lieux dont il a la responsabilité. La question fondamentale consiste plutôt à déterminer dans quel cas l'intérêt de l'État sur les objets ou les renseignements en cause doit prévaloir sur les droits du citoyen. Lors d'une arrestation, comme dans tout autre cas, la justification de la fouille doit se trouver dans les circonstances. C'est pourquoi nous recommandons le maintien de l'exigence actuelle suivant laquelle la fouille doit constituer une précaution raisonnable pour être justifiée par l'arrestation.

B. L'étendue de la fouille

129. À l'heure actuelle, on admet généralement que la portée de la fouille concomitante de l'arrestation s'étend aux endroits placés sous le pouvoir de la personne arrêtée. Les limites ainsi définies sont

fort vagues. Certes, une certaine latitude est nécessaire à cause des circonstances particulières de chaque cas. Cela n'empêche pas qu'il faille tenter d'éclaircir cette question par rapport au principe fondamental de la fouille sans mandat. Or, ce principe consiste à refuser à la personne arrêtée l'accès aux objets qui présentent une valeur probante et qui peuvent être détruits, ainsi qu'aux armes et aux objets qui peuvent mettre la sécurité en danger ou faciliter une évasion. Il s'ensuit que la portée du pouvoir devrait être limitée aux endroits auxquels la personne arrêtée a accès lorsque la fouille a lieu.

130. On pourrait craindre qu'une telle position introduise une part d'incertitude dans la définition des pouvoirs de la police. Les fluctuations que l'on retrouve dans la jurisprudence américaine relative à la portée des fouilles, notamment celles des véhicules[159], illustrent les problèmes susceptibles de se poser. Ainsi, tout l'intérieur de la voiture se trouve-t-il sous le pouvoir du chauffeur? Et le coffre? Nous reconnaissons que ces questions sont épineuses. Toutefois, en ce qui concerne les fouilles de véhicules, les dispositions que nous proposerons un peu plus loin dans ce chapitre et qui établissent des pouvoirs assez étendus suffisent à combler ce besoin de clarté. Ces dispositions confèrent à la police le pouvoir non équivoque, pour peu que les motifs requis existent[160], de fouiller intégralement le véhicule occupé par une personne arrêtée. Cela laisserait comme principal sujet de discussion le cas où la personne est trouvée dans un endroit privé, comme une résidence ou un lieu de travail.

131. Cette question de la portée de la fouille dans de telles circonstances a fait l'objet de controverses tant aux États-Unis qu'en Grande-Bretagne. Dans le jugement définitif qu'elle a rendu dans l'affaire *Chimel*, la Cour suprême des États-Unis a déclaré ce qui suit:

> [TRADUCTION]
> Un pistolet placé sur une table ou dans un tiroir devant la personne arrêtée est aussi dangereux pour l'agent que s'il était dissimulé sous les vêtements de la personne. Il ne fait donc aucun doute que le policier est fondé à fouiller la personne arrêtée de même que les endroits se trouvant «directement sous son pouvoir». Cette expression doit être interprétée de façon à désigner tout endroit où la personne pourrait s'emparer d'une arme ou prendre possession d'un élément de preuve en vue de le détruire[161].

Par contre, la Commission royale sur la procédure pénale en Angleterre a proposé que la loi permette la fouille sans mandat de l'endroit occupé ou placé sous le pouvoir de la personne, même si celle-ci est arrêtée ailleurs. Cependant, de telles fouilles ne peuvent avoir lieu que s'il existe des motifs raisonnables de soupçonner la

présence d'objets liés à la perpétration de l'infraction dont la personne est inculpée ou à une infraction semblable[162].

132. On peut reprocher à la solution britannique de faire bien peu de cas du droit que détient le citoyen sur les lieux qu'il occupe. Les circonstances justifiant l'atteinte à la liberté que comporte l'arrestation n'impliquent pas nécessairement que le citoyen perd automatiquement le droit à toute protection contre les atteintes à l'espace qui constitue son domaine privé. Dans des décisions canadiennes récentes, on a soulevé la question des rapports entre les pouvoirs d'arrestation et la violation de l'espace privé. Ces décisions montrent clairement que de façon constante, les tribunaux se sont montrés réticents à cautionner l'introduction sans mandat dans la vie privée des personnes, peu importe qu'elles soient soupçonnées d'infraction[163]. Les recherchistes de la Commission ont pu constater que les agents de la paix d'un certain nombre de villes canadiennes abondaient dans ce sens. Ils ont déclaré que même après avoir effectué une arrestation, ils préféraient avoir un mandat en leur possession avant de se livrer à la fouille de l'endroit occupé par la personne arrêtée.

133. Nous sommes d'avis que la règle formulée dans l'affaire *Chimel* est bien fondée. Bien qu'à première vue, il puisse sembler trop rigoureux et inutilement restrictif, le critère de l'espace se trouvant à la portée de la personne fournit une définition concrète de l'espace placé sous le pouvoir de la personne arrêtée. En réalité, le fait d'étendre la portée de la fouille et de la saisie au-delà de l'espace se trouvant à la portée de la personne arrêtée pourrait soulever des problèmes de définition beaucoup plus graves que ceux qu'il résout[164]. Par ailleurs, l'adoption de cette règle au Canada laisserait tout de même un certain nombre de possibilités à l'agent de la paix qui désire fouiller l'endroit occupé par la personne qu'il compte arrêter: il peut demander la délivrance d'un mandat soit avant de pénétrer dans cet endroit, soit après l'arrestation. Dans un cas comme dans l'autre, le recours au mécanisme du télémandat, dont nous traiterons plus loin, peut s'avérer un outil précieux[165]. En somme, nous estimons que les inconvénients que comporte l'obtention d'un mandat doivent généralement céder le pas devant les objectifs que poursuit la règle formulée dans l'affaire *Chimel*.

134. Il existe cependant un cas où l'exigence du mandat peut sembler inutilement rigoureuse. Il s'agit du cas où les objets saisissables se trouveraient à la vue de l'agent de la paix lors de l'arrestation, tout en n'étant pas à la portée de la personne arrêtée. La doctrine relative à ce cas particulier, laquelle est établie depuis longtemps aux États-Unis, permettrait la saisie des biens en cause[166]. Nous y revien-

drons plus loin[167]. Par ailleurs, en ce qui a trait à la portée de la fouille concomitante de l'arrestation, se pose également la question des touchers intimes auxquels la personne peut être tenue de se soumettre. Dans la mesure où il s'agit d'«examens médicaux», les recommandations que nous formulerons un peu plus loin exigeraient le recours à des mécanismes particuliers[168].

C. Les choses qui peuvent être saisies

135. Comme nous l'avons déjà expliqué, les justifications relatives aux fouilles concomitantes de l'arrestation se rapportent à un certain nombre de catégories d'objets: les produits d'un vol, les preuves de l'infraction que l'on prétend avoir été commise, ainsi que les armes dangereuses[169]. Par ailleurs, suivant la jurisprudence, est illégale la saisie d'objets non liés à l'intérêt légitime qu'a l'État dans l'arrestation, comme l'argent que la personne détient légalement[170]. Nous avons noté précédemment que les objets saisissables visés par la fouille concomitante de l'arrestation se répartissent dans des catégories semblables à celles qui font l'objet des mandats de perquisition. La définition du terme «choses saisissables» que nous avons proposée devait censément viser toutes les fouilles et perquisitions, y compris celles qui sont concomitantes de l'arrestation[171]. Cette approche est conforme à celle qui a été adoptée dans le *Code de l'A.L.I.*, suivant lequel la définition du terme [TRADUCTION] «choses saisissables» lors de l'arrestation englobe les différentes catégories de choses saisissables en vertu d'un mandat[172].

136. En cas d'arrestation, l'impératif de la sécurité pourrait toutefois justifier une extension de la portée du pouvoir de saisie. En effet, même si certains instruments peuvent ne pas être visés par les dispositions du *Code criminel* portant sur l'usage illégal ou la possession d'armes, il peut être plus prudent de les enlever à l'accusé lors de l'arrestation de celui-ci. Or, en pareil cas, les objets ainsi saisis n'ont pas de valeur probante, et il n'existe aucune raison de les confisquer. Leur saisie a seulement pour but de faciliter l'exercice du pouvoir d'arrestation. Pour cette raison, nous recommandons que, outre les choses «saisissables», l'agent de la paix qui procède à l'arrestation d'une personne soit habilité à saisir toute arme ou autre objet susceptible de permettre à la personne de s'échapper, ou de mettre en péril soit la vie ou la sécurité de l'agent de la paix ou du public, soit sa propre vie ou sa propre sécurité.

137. Enfin, l'arrestation justifie la saisie d'objets permettant à la police d'identifier la personne arrêtée. Ainsi, les dispositions des sous-alinéas 450(2)*d*)(i), 452(1)*f*)(i) et 453(1)*i*)(i) du *Code criminel* reconnaissent que l'agent de la paix ou le fonctionnaire responsable peut, lorsque cela est nécessaire en vue «d'identifier la personne», arrêter et détenir sous garde cette personne plutôt que de la remettre en liberté en lui délivrant une citation à comparaître ou une sommation. Par ailleurs, le pouvoir de fouiller une personne arrêtée en vue de l'identifier a été reconnu en common law[173]. Nous recommandons que ce pouvoir soit reconnu dans les dispositions que nous sommes en train d'élaborer.

III. Les cas où le délai mettrait en péril la vie humaine ou la sécurité du public

RECOMMANDATION

9. Lorsqu'un agent de la paix croit pour des motifs raisonnables:

a) qu'une chose «saisissable» se trouve en possession d'une personne ou dans un endroit ou un véhicule, et

b) que le délai nécessaire à l'obtention d'un mandat aurait pour effet de mettre en péril la vie humaine ou la sécurité,

il devrait être habilité à fouiller cette personne, cet endroit ou ce véhicule, et à saisir sans mandat ces choses «saisissables».

138. En dehors du contexte de l'arrestation, la protection de la vie et de la sécurité constitue une valeur essentielle dans le cas de plusieurs pouvoirs d'agir sans mandat. Ce principe ressort clairement des dispositions des articles 99 et 101 du *Code criminel*, qui autorisent les perquisitions en matière d'armes. Il constitue également une composante essentielle du pouvoir de pénétrer dans un lieu afin d'arrêter ou de prévenir une violation de la paix, ou d'enquêter sur une violation de la paix. Nous sommes convaincus du bien-fondé de ce principe. Dès lors que la vie humaine ou la sécurité sont mises en péril par le délai nécessaire à l'obtention d'un mandat, les garanties que comporte le mandat doivent manifestement être sacrifiées au profit de ces valeurs supérieures. Même si le fait d'autoriser de telles fouilles en l'absence des circonstances qui donnent lieu à l'arrestation

comporte certains risques (sur lesquels nous reviendrons en parlant de la recommandation 10), nous estimons que la protection de la vie et de la sécurité doit avoir préséance.

139. Signalons toutefois que l'existence des motifs justifiant l'atteinte doit être établie: l'agent de la paix doit avoir des motifs raisonnables de croire que la fouille lui permettra de découvrir une chose «saisissable». Toute arme dont la possession, dans les circonstances, constitue une infraction serait visée par ce pouvoir de saisie. Mais bien que la disposition proposée ait pour effet d'englober les pouvoirs de fouille sans mandat prévus aux articles 99 et 100 du *Code criminel*, à certains égards, elle est plus restrictive que le pouvoir de préserver la paix du common law, et que les dispositions de l'article 101 adoptées récemment. Nous traiterons plus loin de la nécessité de ces pouvoirs additionnels[174].

IV. Les fouilles de véhicules lorsque le délai est susceptible d'entraîner la perte ou la destruction de choses saisissables

RECOMMANDATION

10. Lorsqu'un agent de la paix arrête une personne qui a le contrôle d'un véhicule ou qui occupe celui-ci, et croit pour des motifs raisonnables:

a) qu'une chose «saisissable» se trouve dans le véhicule; et

b) que le délai nécessaire à l'obtention d'un mandat est susceptible d'entraîner la perte ou la destruction de la chose «saisissable»,

il devrait être habilité à fouiller le véhicule et à saisir sans mandat la chose «saisissable».

140. Essentiellement, cette disposition étend le pouvoir de fouiller un véhicule automobile au-delà des limites qui seraient normalement imposées par la règle générale concernant la fouille concomitante de l'arrestation, règle que nous avons formulée à la recommandation 7. À cet égard, nous avons adopté une position prudente. D'une part, nous reconnaissons les exigences particulières des cas où le suspect occupe ou contrôle un véhicule automobile.

Comme l'a récemment affirmé la Cour suprême des États-Unis dans l'affaire *Ross*[175], il est essentiel que le pouvoir de l'agent de la paix soit clairement défini, indépendamment de toute distinction oiseuse entre les parties du véhicule qui peuvent être fouillées et celles qui ne le peuvent pas. Nous souscrivons au principe formulé dans l'affaire *Ross*, suivant lequel la portée de la fouille sans mandat d'un véhicule devrait être aussi large que celle qu'un fonctionnaire judiciaire pourrait autoriser par un mandat. D'autre part, notre proposition se distingue également par les pouvoirs qu'elle *ne confère pas*. Notamment, elle reflète notre réticence à conférer des pouvoirs de fouille, de perquisition et de saisie sans mandat en dehors du contexte de l'arrestation et ce, même si le délai nécessaire à l'obtention du mandat peut avoir pour effet de soustraire certains éléments de preuve à la police. Cette réticence est liée non seulement aux fouilles de véhicules, mais également aux fouilles de personnes et aux perquisitions. Dans ce sens, nous avons tenté d'établir un équilibre entre la valeur primordiale que constitue la protection de la vie humaine et de la sécurité, laquelle justifie les dispositions relativement larges de la recommandation 9, et la valeur importante, quoique secondaire, qui consiste à préserver les choses «saisissables» elles-mêmes. Pour les raisons que nous expliquerons un peu plus loin, nous estimons que cette seconde valeur ne justifie pas l'adoption d'une disposition de la nature de celle que nous recommandons relativement à la première valeur.

A. Le droit actuel

141. À l'heure actuelle, le droit canadien ne reconnaît, par rapport à l'exigence du mandat, aucune exception générale fondée sur la nécessité d'empêcher la perte ou la destruction éventuelle de choses saisissables. Cette question a été examinée par la jurisprudence dans d'autres contextes. Par exemple, dans l'affaire *Eccles* c. *Bourque*[176], la Cour suprême a reconnu qu'un agent de la paix pouvait être excusé de ne pas s'être annoncé avant de s'introduire dans un lieu afin d'y procéder à une arrestation, s'il a agi en vue de prévenir la destruction d'éléments de preuve. Cependant, dans le cas où l'agent de la paix déciderait de procéder à une fouille sans mandat, afin de prévenir la destruction d'éléments de preuve, les solutions qui s'offrent à lui sont assez limitées. En effet, s'il ne peut obtenir le consentement de la personne visée, et qu'il n'existe aucun

danger pour la vie humaine ou la sécurité, il ne lui reste que deux possibilités: invoquer un pouvoir particulier prévu par la loi, ou arrêter la personne et la fouiller ensuite.

142. On retrouve de nombreux pouvoirs particuliers permettant des fouilles, des perquisitions et des saisies sans mandat dans des règlements fédéraux et des lois provinciales qui débordent le cadre de la présente étude. Dans le domaine de la législation pénale, le principal exemple est celui des pouvoirs qui existent en matière de stupéfiants et de drogues[177]. Étant donné la facilité avec laquelle les stupéfiants et les drogues peuvent être transportés ou détruits, on considère généralement que le problème de la perte des éléments de preuve est particulièrement grave dans ce domaine. C'est ce qui explique notamment pourquoi les agents de police préfèrent, lorsqu'ils effectuent une perquisition dans une maison d'habitation, avoir recours à un mandat de main-forte, plutôt qu'à un mandat de perquisition. Dans le cadre de l'enquête que la Commission de réforme du droit a effectuée sur l'usage du mandat de main-forte au Canada, 40 pour cent des agents qui y avaient recours ont expliqué qu'ils n'avaient pas fait usage du mandat de perquisition à cause de la nécessité de prévenir la destruction ou l'enlèvement des éléments de preuve[178]. Par ailleurs, on retrouve la préoccupation de prévenir la destruction des éléments de preuve dans le contexte des saisies sans mandat qui peuvent avoir lieu en matière de jeux et de paris, en vertu des dispositions du paragraphe 181(2) du *Code criminel*. Ainsi, certains agents de la paix interrogés par les recherchistes de la Commission ont relaté des cas où ils avaient fait irruption dans une maison de jeu et s'étaient vus forcés de procéder immédiatement à une saisie.

143. Dans les cas où il n'existe aucun pouvoir particulier prévu par la loi, la seule possibilité est celle de l'arrestation. On aurait tort de sous-estimer cette méthode qui peut parfois être très utile. En effet, dans la mesure où la fouille, la perquisition ou la saisie vise les «produits d'une infraction» ou des «objets dont la possession, dans les circonstances de l'espèce, constitue une infraction», il n'y a pas loin entre le fait de croire que la personne a ces choses saisissables en sa possession, et celui de croire que la personne est en train de commettre une infraction: possession de biens obtenus par la perpétration d'un crime, ou possession de stupéfiants ou de drogues[179]. Néanmoins, l'absence d'autre solution possible pose certains problèmes. En effet, dans la mesure où la portée du pouvoir de fouille, lors de l'arrestation, est limitée à l'espace qui se trouve sous le pouvoir de la personne arrêtée (ou à sa portée, comme nous le

recommandons), elle ne vise pas les autres endroits, comme l'intérieur du véhicule que cette personne conduit, où les objets saisissables peuvent se trouver et sont susceptibles d'être perdus ou détruits si une fouille n'a pas lieu immédiatement. D'un point de vue plus théorique, il y a lieu de s'interroger afin de voir s'il est logique d'imposer l'arrestation comme condition préalable de la fouille visant certains objets saisissables seulement.

144. En vue d'apporter une solution à ces problèmes, nous avons pris en considération les différentes positions concernant la prévention de la perte ou de la destruction des choses saisissables qui ont été adoptées ailleurs par la jurisprudence, les commissions de réforme du droit et les auteurs. Bon nombre de ces autorités ont préconisé l'extension, à cet égard, des pouvoirs de fouille, de perquisition et de saisie au-delà du cas de l'arrestation. Cependant, les autres exceptions à l'exigence du mandat qui ont été reconnues sont généralement limitées suivant une ou plusieurs variables. Bien que la nature exacte et les combinaisons possibles de ces variables soient différentes selon les autorités, il est possible d'identifier un facteur prépondérant: la nature de l'objet de la fouille ou de la perquisition.

B. Les différents objets des fouilles et des perquisitions

145. Aux fins du présent document, nous reconnaissons trois objets possibles des fouilles et des perquisitions: les personnes, les véhicules automobiles et les lieux privés, que ceux-ci soient occupés à des fins résidentielles ou non. Dans certains États, on reconnaît que le risque de perte ou de destruction des choses saisissables peut justifier que l'on porte atteinte, au moyen d'une fouille ou d'une perquisition sans mandat, à certains droits privés mais non à d'autres. Cette distinction résulte probablement de l'interaction de deux facteurs: la valeur relative attachée à différents droits, et le risque particulier de perte ou de destruction correspondant.

(1) *Les véhicules automobiles*

146. Dans les autres États régis par le common law, on semble reconnaître de façon générale que les fouilles de véhicules automobiles devraient échapper aux exigences du mécanisme du

mandat. Cela tient en partie au fait que même si les véhicules automobiles sont des «lieux privés», on leur attache moins de valeur qu'aux endroits où les citoyens vivent ou travaillent[180]. En outre, le caractère «mobile» des véhicules fait justement qu'ils peuvent aisément être soustraits à la surveillance de l'agent de la paix dans le délai nécessaire à l'obtention d'un mandat de perquisition. Pourtant, ces facteurs n'ont pas entraîné, en droit canadien, la prolifération de pouvoirs particuliers concernant la fouille sans mandat des véhicules automobiles. En fait, seules les dispositions de l'article 99 du *Code criminel* mentionnent expressément que les véhicules peuvent faire l'objet d'une perquisition sans mandat. La raison principale en est qu'en vertu des législations provinciales en matière d'alcool et de véhicules automobiles, les agents de la paix ont facilement accès aux véhicules[181].

147. C'est sans doute aux États-Unis que l'on a le plus approfondi la question des perquisitions sans mandat dans les véhicules. Dans l'affaire *Chambers* v. *Maroney*, la Cour suprême des États-Unis a fait le commentaire suivant:

> [TRADUCTION]
> Les circonstances qui fournissent les motifs donnant lieu à une perquisition en vue de découvrir des biens déterminés sont généralement imprévisibles. En outre, la possibilité de fouiller le véhicule est souvent aléatoire puisque celui-ci peut être déplacé facilement. En pareil cas ... pour que le véhicule puisse être fouillé efficacement, la perquisition doit avoir lieu immédiatement et sans mandat, ou alors, la voiture doit être saisie et détenue sans mandat pendant le délai nécessaire à l'obtention d'un mandat de perquisition[182].

Inspiré de la jurisprudence traditionnelle américaine, le *Code de l'A.L.I.* contient la disposition suivante:

> [TRADUCTION]
> L'agent de la paix qui croit, pour des motifs raisonnables, qu'un véhicule en mouvement ou pouvant être déplacé, se trouvant sur une route publique, sur l'eau, dans un autre endroit public, ou encore dans un endroit privé où le véhicule a été introduit illégalement, peut être saisi ou contient des objets saisissables ... peut, sans pour cela détenir un mandat de perquisition, immobiliser, détenir et fouiller le véhicule, et peut saisir les objets saisissables découverts au cours de la perquisition[183].

La Commission royale sur la procédure pénale en Angleterre et au pays de Galles a également proposé une disposition concernant les fouilles effectuées sans mandat dans les véhicules automobiles, en vue d'y trouver des objets saisissables[184].

148. Si elle repose sur les mêmes considérations, la recommandation 10 du présent document n'établit pas d'exception à l'exigence du mandat, dans le cas des véhicules automobiles. Elle constitue plutôt une extension de la portée de la fouille concomitante de l'arrestation. En grande partie, notre position à ce sujet s'inspire de préoccupations liées à la fouille des personnes. Pour des raisons de politique, ces considérations (la nécessité de définir clairement les pouvoirs et la réticence à accroître indûment le pouvoir discrétionnaire de la police) nous incitent à limiter le plus possible la portée des pouvoirs de perquisition sans mandat aux cas d'arrestation[185]. Pourtant, deux facteurs particuliers au contexte des fouilles de véhicules doivent être mentionnés.

149. En premier lieu, sauf dans le cas où le véhicule serait inoccupé ou ne serait soumis à aucune surveillance, force nous est de constater que la plupart des fouilles de véhicules comportent une arrestation de fait: la personne visée est retenue contre sa volonté tant que dure la perquisition. Il est vrai que dans l'affaire *Chromiak*[186], la Cour suprême du Canada a jugé que lorsqu'une personne se soumet à la directive d'un policier et immobilise son véhicule, elle peut être considérée comme ayant agi volontairement et, partant, comme n'étant pas en état d'arrestation à proprement parler. La décision rendue dans cette affaire, où il s'agissait d'une demande d'échantillon d'haleine, doit toutefois être examinée à la lumière des faits particuliers de l'espèce. Elle n'a pas eu pour effet d'établir que l'immobilisation d'un véhicule aux fins d'une enquête ne correspondait jamais à une arrestation. En réalité, il est fort peu probable qu'une personne dont le véhicule a été immobilisé et est soumis à une perquisition, soit autorisée, ou même se sente autorisée, à quitter les lieux avec ou sans son véhicule. Par conséquent, il est permis de penser que la décision rendue dans l'affaire *Chromiak* serait en fait rarement applicable aux cas de fouilles de véhicules automobiles. Et s'il est possible de considérer la détention, dans des cas semblables, comme l'accessoire de l'exercice du pouvoir de perquisition, les agents de la paix, pour leur part, décrivent souvent l'immobilisation d'un véhicule comme faisant partie d'une enquête relative à la perpétration d'une infraction par le conducteur ou l'occupant. Il semble donc plus réaliste de considérer l'arrestation comme le pouvoir principal en jeu (la maîtrise du suspect), et la perquisition comme le pouvoir accessoire (la fouille du véhicule du suspect).

150. En second lieu, l'établissement d'un pouvoir parallèle de fouille de véhicules en dehors du contexte de l'arrestation risque

d'entrainer une interprétation et une évolution incohérentes et confuses des deux sources de pouvoir. À cet égard, il convient d'examiner ce qui s'est produit aux États-Unis et qui a abouti aux décisions rendues simultanément en 1981, dans les affaires *Robbins*[187] et *Belton*[188]. Dans le premier cas, la Cour suprême a déclaré illégale la saisie de marijuana dissimulée dans un sac opaque, lequel se trouvait dans le coffre de la voiture du suspect. Dans le second cas, le même tribunal a considéré comme valide la saisie de cocaine cachée dans la poche d'une veste se trouvant à l'intérieur de la voiture occupée par le suspect. Bien que dans ni l'une ni l'autre de ces affaires l'on ait déterminé de façon claire quelle était l'importance de la source du pouvoir de perquisition, il est à remarquer que dans le premier cas, on a jugé qu'il s'agissait d'une perquisition sans mandat effectuée dans un véhicule et visée par l'exception relative aux véhicules automobiles, et que dans le second cas, il s'agissait d'une fouille concomitante de l'arrestation. Étant donné la similitude de faits de ces deux causes, il n'y a rien d'étonnant à ce que la Cour suprême se soit sentie obligée, dans l'année qui a suivi, de résoudre le doute qu'elle avait elle-même créé. C'est pourquoi elle a étendu la portée de l'exception relative aux véhicules automobiles dans l'affaire *Ross*[189]. Même si nous ne souscrivons pas à la solution proposée dans cette affaire, il n'en reste pas moins que celle-ci illustre la nécessité de définir clairement le pouvoir de fouiller sans mandat les véhicules automobiles. Nous sommes d'avis que le pouvoir unique établi à la recommandation 10 suffit à réaliser cet objectif.

(2) *Les lieux privés*

151. C'est sans doute dans le domaine des fouilles des lieux privés, que ceux-ci soient occupés à des fins résidentielles ou non, que les arguments en faveur de l'établissement d'exceptions à l'exigence du mandat en vue de préserver les choses saisissables sont le moins convaincants. Contrairement aux personnes et aux véhicules, ces endroits sont immobiles. Bien que les éléments de preuve que l'on croit se trouver en un tel endroit puissent être enlevés ou détruits dans le délai nécessaire à l'obtention d'un mandat, il est très improbable que l'endroit lui-même disparaisse. En outre, comme nous l'avons expliqué ci-dessus, le droit du citoyen à l'inviolabilité de son espace privé est reconnu en droit depuis fort longtemps[190].

152. Outre les considérations théoriques dont il faut tenir compte, l'établissement d'un pouvoir général de fouiller sans mandat

les lieux privés pose un problème pratique. En effet, un tel pouvoir risque d'être utilisé très fréquemment, rendant ainsi illusoire l'exigence du mandat. En fait, en Australie, on semble avoir ouvert la voie à cette possibilité en adoptant le *Criminal Investigation Bill*, lequel permet de fouiller sans mandat un lieu privé afin de prévenir la perte ou la destruction d'éléments de preuve pertinents dans [TRADUCTION] «des circonstances d'une telle gravité et d'une telle urgence qu'elles exigent» une dérogation à l'exigence du mandat[191]. Or, la portée de l'exception définie par les mots précités est vague et pourrait être interprétée de façon très large. À ce sujet, il convient d'examiner la façon dont les dispositions de l'article 101 du *Code* canadien ont été appliquées. Bien que la portée du pouvoir de perquisition sans mandat conféré par cette disposition soit limitée au cas où il serait «impraticable» d'obtenir un mandat, en réalité, les perquisitions sans mandat effectuées en vertu de cette disposition sont devenues la règle[192].

153. Certains tribunaux et auteurs américains ont tenté d'éviter ce danger en définissant le pouvoir de fouiller sans mandat les lieux privés en des termes restreignant son exercice aux situations véritablement urgentes. Ainsi dans l'affaire *Rubin*, en matière de stupéfiants, la Cour de Circuit a établi une liste de facteurs à prendre en considération:

> (1) L'urgence de la situation et le délai nécessaire à l'obtention d'un mandat.
>
> (2) Le fait de croire pour des motifs raisonnables que les biens de contrebande sont sur le point d'être enlevés.
>
> (3) Le danger auquel sont exposés les agents de police qui surveillent l'endroit où se trouvent les biens de contrebande, en attendant l'obtention du mandat.
>
> (4) L'information selon laquelle les possesseurs des biens de contrebande savent que la police est sur leurs traces.
>
> (5) La facilité avec laquelle les biens de contrebande peuvent être détruits, et le fait [TRADUCTION] «que les personnes qui se livrent au trafic de stupéfiants sont généralement disposées à faire tous les efforts pour se débarrasser des stupéfiants et s'échapper[193]».

Bien que cet ensemble exhaustif de facteurs puisse être un outil précieux pour le tribunal appelé à statuer, *a posteriori*, sur la validité de la perquisition, sa complexité est telle qu'il n'a, à toutes fins utiles, aucun intérêt pour l'agent de la paix qui se voit dans l'obligation de décider, de but en blanc, s'il doit ou non procéder à une perquisition sans mandat.

154. Quant à la Commission royale britannique sur la procédure pénale[194] et l'"American Law Institute"[195], ils ont de façon uniforme refusé d'étendre l'application des perquisitions sans mandat dans les lieux privés (hormis le cas où la personne visée donne son consentement) en dehors du contexte de l'arrestation et, dans le premier cas, du danger pour la vie ou la sécurité. Pour les raisons qui précèdent, nous souscrivons à cette position.

(3) *Les fouilles de personnes*

155. Dans ce contexte, les fouilles de personnes posent les problèmes les plus difficiles. À l'instar des véhicules, les personnes peuvent généralement se déplacer facilement, d'où le même risque de perte ou de destruction des éléments de preuve si l'agent de la paix ne peut procéder immédiatement à la fouille de la personne soupçonnée d'avoir en sa possession des objets saisissables. Pourtant, l'importance prépondérante que notre droit a toujours attachée à l'inviolabilité de la personne nous force à distinguer ces deux cas. Si l'immobilisation et la fouille d'un véhicule, en l'absence de toute justification légale, peuvent constituer une atteinte aux biens d'une personne, il n'existe aucune commune mesure entre cet acte et les voies de fait, les coups et blessures, l'arrestation illégale et les autres formes d'atteintes que peut comporter une fouille personnelle injustifiée.

156. L'importance des droits individuels en jeu est reconnue par le droit américain, suivant lequel les fouilles personnelles sans mandat ne sont autorisées, en dehors du contexte de l'arrestation, que par mesure de protection lorsque l'on soupçonne la présence d'une arme dissimulée, et non pour empêcher la destruction d'autres objets. Cette position repose sur l'argument voulant que les risques d'abus sont trop grands par rapport aux avantages des fouilles sans mandat dans les autres cas[196]. Par contre, la Commission royale britannique a recommandé l'établissement d'un pouvoir permettant de fouiller une personne se trouvant dans un endroit public et soupçonnée, pour des motifs raisonnables, de transporter des biens volés ou d'autres objets dont la possession est illégale:

> [TRADUCTION]
> Nous sommes d'avis que les personnes qui se trouvent dans la rue et qui ont commis une infraction contre les biens ou transportent des objets dont la possession constitue une infraction criminelle ne devraient pas être à l'abri de la possibilité d'être fouillées.... Cependant, les motifs de

la fouille doivent être fondés sur des soupçons raisonnables et l'exercice de ces pouvoirs doit être subordonné à des garanties rigoureuses[197].

157. La question de savoir si l'on doit autoriser les fouilles personnelles afin de découvrir des objets saisissables susceptibles d'être perdus ou détruits soulève, dans une large mesure, le problème de la nécessité de l'arrestation préalable. L'établissement d'un lien entre les fouilles personnelles non consensuelles et l'état d'arrestation préalable remonte aux origines du common law[198]. On a toujours vu dans ce rapprochement une certaine mesure de protection pour les citoyens. En effet, comme la justification de l'arrestation légale est limitée par l'existence de «motifs raisonnables et probables», on a toujours considéré que l'arrestation préalable constituait une garantie efficace contre les fouilles abusives. On considère également que l'extension des pouvoirs de fouille personnelle en vertu de la loi contribue à corroder cette protection. C'est l'opinion émise par un groupe minoritaire du "British Advisory Committee on Drug Dependence":

> [TRADUCTION]
> Suivant l'opinion minoritaire, l'abolition du pouvoir de fouille en vertu de la loi aurait sans aucun doute pour effet de réduire considérablement le nombre de personnes soumises à des fouilles, puisque le pouvoir d'arrestation est beaucoup plus restrictif que le pouvoir de fouille prévu par la loi. On estime que l'adoption de la proposition réduirait de façon considérable les interventions vexatoires de la police dans la vie des honnêtes gens[199].

D'un certain point de vue, l'arrestation préalable est pour ainsi dire considérée comme un substitut du mandat afin de limiter le recours abusif aux fouilles personnelles. Bien que pour une grande part, notre position reflète ce point de vue, nous reconnaissons que celui-ci n'est pas à l'abri des critiques.

158. Le fait d'exiger que l'agent de la paix procède à l'arrestation de la personne afin d'être légalement habilité à fouiller celle-ci peut avoir comme double conséquence d'encourager l'agent à procéder à des arrestations lorsque cela n'est pas nécessaire, aussi bien que de le dissuader d'effectuer des fouilles justifiées. Les données pratiques dont nous disposons sont ambiguës à ce sujet. Des études d'observateurs participants ont révélé que les fouilles personnelles concomitantes de l'arrestation font souvent suite à la décision de prendre des mesures formelles à l'encontre du suspect. Cependant, les difficultés qu'ont éprouvées les observateurs à distinguer entre les arrestations et les autres types de rapports entre la police et les citoyens rendent problématiques les conclusions de ces études[200]. On peut également

trouver certains renseignements dans les questionnaires qui ont été remplis dans le cadre de l'enquête de la Commission sur le mandat. Parmi les fouilles personnelles effectuées au cours de l'exécution d'un mandat, le pourcentage de fouilles concomitantes de l'arrestation était beaucoup plus élevé dans le cas de mandats délivrés en vertu du *Code criminel*, que dans le cas de mandats délivrés en vertu de la *Loi sur les stupéfiants* ou de la *Loi des aliments et drogues* (17,4 pour cent contre 11,2 pour cent)[201]. Les résultats de cette étude montrent que cet écart ne peut être attribuable à l'existence de plus de justifications pour l'arrestation dans le cas des mandats délivrés en vertu du *Code criminel*. En revanche, il est possible que les agents de police aient plus fréquemment invoqué l'arrestation comme motif de la fouille dans ce dernier cas parce qu'ils n'avaient pas le pouvoir de fouiller les personnes en vertu du mandat, contrairement au cas des mandats en matière de stupéfiants et de drogues.

159. On peut prétendre que dans chacun de ces cas, l'arrestation était un argument invoqué *a posteriori* pour justifier la fouille. De fait, il est difficile, en pratique, de distinguer l'arrestation suivie d'une fouille de la simple fouille[202]. Cela semble donner plus de poids à l'argument suivant lequel l'exigence de l'arrestation préalable a peu d'effets pratiques pour le policier qui décide de fouiller une personne. En effet, lorsque le policier affirme avoir arrêté la personne avant de la fouiller, il est difficile de prouver le contraire. Suivant le critère établi dans l'affaire *Whitfield*, laquelle fait autorité au Canada, l'agent n'aurait qu'à prouver qu'il a touché la personne en vue de la détenir[203].

160. Par ailleurs, selon le droit actuel, il est très difficile de savoir si la fouille accessoire peut être légale lorsque l'arrestation ne l'est pas. Traitant des pouvoirs de fouille et de perquisition en Angleterre et au pays de Galles, Leigh cite la règle applicable en Nouvelle-Zélande: [TRADUCTION] «le droit de procéder à une fouille personnelle dépend non pas de la *légalité* de l'arrestation, mais bien du *fait* de l'arrestation[204]». Pourtant, suivant la vieille cause britannique *Dillon* v. *O'Brien*, le pouvoir de fouille était clairement subordonné à [TRADUCTION] «l'arrestation légale[205]». On pourrait trancher cette contradiction par l'adoption d'un texte législatif reprenant cette dernière position, ce qui ferait de l'observation des règles concernant l'arrestation une condition préalable et nécessaire à la fouille. On peut toutefois se demander quel serait l'effet réel de telles règles pour la protection des citoyens à l'encontre des fouilles abusives, surtout lorsqu'il s'agit d'un acte criminel. En effet, comme la possession de nombreux biens que l'agent de la paix peut vouloir trouver au moyen d'une fouille personnelle constitue une infraction punissable par voie de mise en

accusation[206], il va sans dire que dans bon nombre de cas où l'agent aurait des motifs raisonnables de fouiller la personne afin de trouver des objets saisissables, il aurait également des motifs raisonnables et probables de l'arrêter pour avoir commis l'infraction en question, et de la fouiller accessoirement. Les seuls cas où l'on ne retrouverait pas cette adéquation entre les motifs de l'arrestation et les motifs de la fouille seraient ceux où l'infraction reprochée serait punissable sur déclaration sommaire de culpabilité, auquel cas la personne ne pourrait être arrêtée que si elle était trouvée en flagrant délit[207].

161. Ainsi, il est possible que l'exigence de l'arrestation préalable ait peu d'intérêt pratique dans l'exercice du pouvoir de fouille, du moins en matière d'actes criminels. Interrogés par les recherchistes de la Commission, les agents de police de diverses forces canadiennes ont révélé que dans le cas où la fouille visait des stupéfiants ou des drogues (où la loi prévoit expressément le pouvoir de fouiller les personnes), aussi bien que dans le cas de biens volés (où la fouille personnelle n'est autorisée que dans la mesure où elle est concomitante de l'arrestation), le critère appliqué était celui des «motifs raisonnables et probables», que l'on appliquait en pratique de façon instinctive plus que rationnelle. Pourtant, l'usage fréquent que font les représentants des forces policières du critère des «motifs raisonnables et probables», critère qui en principe relève de l'arrestation et non des fouilles, des perquisitions et des saisies, semble montrer que l'on associe ces deux pouvoirs en pratique, et que cette association peut avoir un effet restrictif. Si l'on envisage cette possibilité à la lumière des données recueillies au moyen des études d'observations participantes, suivant lesquelles la fouille fait généralement suite à la décision de prendre des mesures concrètes contre un suspect[208], il semble que l'on aurait tort de considérer l'exigence de l'arrestation préalable comme sans intérêt, en tant que moyen d'assurer que le pouvoir de fouille personnelle n'est exercé que dans les cas qui le justifient.

162. Si notre position peut sembler trop retenue, c'est que nous estimons que dans ce domaine, la prudence est de rigueur. Bien que l'existence d'un fondement théorique pour le pouvoir discrétionnaire de fouiller les personnes soit indiscutable, et bien qu'en Grande-Bretagne et en Australie on ait récemment eu tendance à reconnaître ce pouvoir, il importe de bien connaître les risques que comporte l'établissement d'un tel pouvoir. En Angleterre, le rapport Scarman, publié récemment, a décrit les façons de procéder des agents de la paix lors des fouilles visant à retrouver des biens volés. Même si l'exercice de ce pouvoir était limité au cas où il existait des soupçons raisonnables concernant la personne fouillée, on a constaté que ce pouvoir

était souvent exercé de façon intempestive[209]. Bien que l'on n'ait pas pu constater l'existence de telles activités au Canada, certaines commissions gouvernementales[210] et certain auteurs[211] ont pu observer quelques incidents et programmes de fouilles personnelles au hasard en matière de stupéfiants. Bien que les buts de la police soient tout à fait louables lorsqu'elle met en œuvre de tels programmes, il n'en reste pas moins que le fait de conférer aux agents de la paix des pouvoirs suffisamment larges pour agir ainsi entre en contradiction avec le caractère spécifique et réactif que l'on a toujours donné à l'application du droit pénal canadien.

163. En outre, indépendamment de l'effet que cela peut avoir sur les méthodes de la police, il existe une bonne raison de mettre en état d'arrestation la personne détenue pendant la durée d'une fouille et d'une saisie. En effet, cela a deux conséquences intéressantes. En premier lieu, le fait d'aviser la personne qu'elle est en état d'arrestation lui fait comprendre qu'il serait illégal pour elle de résister à l'agent de la paix ou de tenter de s'échapper. Or, cette question est particulièrement importante eu égard à certaines décisions canadiennes récentes qui laissent entendre que le suspect, sur lequel ne s'exerce aucune forme de contrainte reconnue par la loi, pourrait être passible de poursuites criminelles relativement à une telle tentative[212]. En second lieu, l'état d'arrestation peut faire entrer en jeu certaines dispositions de la *Charte canadienne des droits et libertés*, hypothèse sur laquelle nous reviendrons plus loin[213].

C. Conclusion

164. À toutes fins utiles, la recommandation 10 présente un caractère provisoire et ce, pour plusieurs raisons. En effet, comme l'élaboration des pouvoirs de fouille, de perquisition et de saisie concomitantes de l'arrestation dépend de la portée et de la définition des pouvoirs d'arrestation eux-mêmes, nous sommes conscients des effets que pourrait avoir sur cette question le document de travail que la Commission publiera bientôt sur l'arrestation. D'un point de vue plus théorique, nous reconnaissons que toute proposition sur ce sujet met en cause des questions importantes et délicates concernant les méthodes de la police et la vie privée des citoyens. Au cours de discussions au sein de la Commission, nous avons envisagé un certain nombre de solutions possibles, y compris l'établissement d'un pouvoir

discrétionnaire d'effectuer des fouilles, des perquisitions et des saisies sans mandat, lequel serait analogue au pouvoir décrit dans la recommandation 9, mais porterait sur le risque de perte ou de destruction des choses saisissables. Un tel pouvoir pourrait être conçu de façon plus restrictive que celui que contient la recommandation 9. Par exemple, il pourrait viser les personnes et les véhicules seulement, et non les lieux privés, ou encore, il pourrait n'être applicable que lorsque l'objet recherché est lié à la perpétration d'un acte criminel. Même si à ce stade, nous nous sommes abstenus de recommander l'instauration d'un tel pouvoir, nous recevrons avec gratitude tout commentaire ou critique concernant le bien-fondé de notre position actuelle.

CHAPITRE SEPT

Les règles de procédure

165. Dans le présent chapitre, nous présenterons un ensemble de règles régissant les fouilles, les perquisitions et les saisies selon le plan suivant. Pour commencer, nous aborderons les divers problèmes relatifs à la délivrance et à l'exécution des mandats. Ensuite, nous examinerons les problèmes liés à l'exécution des fouilles, des perquisitions et des saisies en général. Enfin, nous traiterons de deux types de problèmes particuliers: les fouilles de personnes et l'accès à l'information relative aux fouilles, aux perquisitions et aux saisies.

I. La délivrance des mandats

A. La nature du mécanisme

RECOMMANDATIONS

11. Le juge de paix devrait être habilité à délivrer un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule s'il existe des motifs raisonnables de croire que cette personne porte ou dissimule sur elle une chose saisissable, ou qu'une telle chose se trouve ou est dissimulée dans ce lieu ou ce véhicule.

12. Sauf dans le cas du télémandat prévu à la recommandation 19, toute demande de mandat de perquisition devrait être présentée sous la forme d'une dénonciation écrite sous serment. La personne chargée de

délivrer le mandat devrait être habilitée à interroger le requérant afin d'obtenir des renseignements supplémentaires sur la demande. Si la décision est fondée sur ces renseignements supplémentaires, ceux-ci devraient être consignés et certifiés dans la dénonciation.

166. Ces recommandations constituent une formulation, en termes généraux, du processus de délivrance du mandat. De nombreux aspects de ce processus exigent une attention particulière et seront examinés en détail dans les recommandations qui suivent. Mais il convient de jeter d'abord un coup d'œil rapide sur la structure générale du mécanisme de délivrance des mandats de perquisition que nous proposons.

167. À l'heure actuelle, la délivrance du mandat de perquisition est une procédure presque exclusivement documentaire. Si les documents accompagnant la demande sont complets et réguliers, le juge de paix n'a pas à se livrer à des fonctions de nature judiciaire comme à interroger le requérant ou à vérifier la fiabilité des sources de celui-ci. Inversement, si le contenu du document comporte des lacunes, celui qui présente la demande ne peut y remédier en fournissant verbalement les détails nécessaires. Ainsi que l'a écrit le juge d'appel Roach dans l'affaire *Re Worrall*, [TRADUCTION] «de simples conversations entre le dénonciateur et le juge de paix ne peuvent servir de fondement à la délivrance du mandat de perquisition. Si quelque chose manque à la dénonciation faite sous serment, il ne peut être remédié à cette lacune par une conversation entre eux[214]».

168. Le fait d'insister sur l'aspect documentaire de la procédure présente plusieurs avantages. Il incite le policier à préparer soigneusement sa demande et à ne pas s'en remettre uniquement à l'initiative du juge de paix pour identifier les faits essentiels. En outre, du moins dans les États où l'on exige que la dénonciation écrite énonce les motifs raisonnables invoqués, la demande documentaire constitue un dossier de base, facilement accessible, concernant la demande soumise au juge de paix. Ainsi, quiconque désire contester la légalité de la délivrance du mandat n'a pas à attendre la transcription de l'audition de la demande. Il lui suffit de vérifier si la dénonciation est conforme aux exigences légales de fond, de forme et de preuve.

169. En revanche, un excès de rigueur dans l'aspect documentaire de la procédure pourrait être néfaste s'il avait pour effet de confiner le juge de paix dans un rôle de gratte-papier. Dans l'affaire *Re Den Hoy Gin*, la Cour d'appel de l'Ontario s'est montrée disposée à passer outre aux apparences en annulant un mandat de perquisition basé sur une fausse dénonciation[215]. Cependant, le droit canadien

actuel ne va pas jusqu'à obliger la personne chargée de la délivrance à faire elle-même enquête. Aux États-Unis par contre, il ne suffit pas, pour que le mandat puisse être délivré, que le requérant atteste la fiabilité de sa source. Du reste, la règle 41(c) des "American Federal Rules" permet au juge de paix [TRADUCTION] «d'interroger sous serment l'auteur de la dénonciation, ainsi que les témoins qu'il désire faire entendre[216]».

170. Si l'insouciance de la personne qui délivre le mandat peut empêcher la découverte d'allégations non fondées, elle peut aussi avoir des conséquences fâcheuses pour les policiers. Par exemple, si le juge de paix omet de demander des précisions sur des «motifs raisonnables» un peu trop laconiques ou mal circonstanciés, il expose le policier à voir son acte annulé par le tribunal, en cas de contestation. Il peut arriver que l'agent s'abstienne de formuler par écrit certains motifs additionnels, soit à cause d'une réticence à apporter des précisions, soit parce qu'il croit qu'un minimum de détails suffit. Il serait alors tout à fait normal pour la personne qui délivre le mandat de chercher à approfondir la question. Ainsi, dans l'affaire *Campbell* v. *Clough*, le requérant n'avait pas donné de précisions sur ses motifs. Le juge de paix était tout de même parvenu, en questionnant celui-ci, à connaître les circonstances de l'enquête, qu'il avait ensuite décrites dans la dénonciation. [TRADUCTION] «À cet égard, déclara le juge McQuaid, je suis d'avis que la juge de paix a non seulement agi de façon prudente, mais aussi de façon ‹judiciaire›, comme il est de son devoir de le faire[217]». Bien que certains juges et juges de paix aient signalé aux recherchistes de la Commission qu'ils avaient adopté cette façon de procéder, les documents recueillis au cours de l'enquête de la Commission sur le mandat montrent que cette pratique est peu répandue. Par exemple, si les mandats de perquisition délivrés dans le district de Montréal s'avèrent fructueux dans une proportion de 52,3 pour cent, on peut penser que les policiers ont souvent de bons motifs de croire que l'objet se trouve bien à l'endroit décrit dans la demande[218]. Pourtant, on pourrait difficilement en arriver à la même conclusion si l'on se fiait seulement au libellé des dénonciations écrites examinées au cours de l'enquête.

171. On pourrait prétendre qu'en prenant un rôle aussi actif, la personne qui délivre le mandat compromet sa neutralité. En effet, pourquoi ne pas laisser le policier assumer les conséquences de son incurie? En réalité, ce serait là confondre la partialité et le désir de voir la justice se faire jour. Bien sûr, les questions du juge de paix ne doivent pas servir à racheter l'inertie des policiers. Au contraire, elles

doivent avoir pour but de vérifier le bien-fondé des allégations et de découvrir les détails passés sous silence. Ces questions peuvent jouer dans les deux sens: si le juge de paix obtient les renseignements voulus, il peut délivrer le mandat; dans le cas contraire, il peut rejeter la demande.

172. Il va sans dire que l'étude des modes d'autorisation est intimement liée à celle des mécanismes d'application et de révision. La contestation des fouilles, des perquisitions et des saisies porte généralement sur la légalité du processus de délivrance, lequel repose sur les documents produits à l'appui de la demande. Nous sommes d'avis que la possibilité de contester la légalité d'une fouille, d'une perquisition ou d'une saisie est un droit essentiel. Par conséquent, en vue de faciliter le processus de révision, l'aspect documentaire du mécanisme du mandat doit être maintenu.

173. On ne doit pas cependant aller jusqu'à interdire à celui qui doit délivrer le mandat de poser des questions afin de mettre en lumière le fondement véritable de la demande. Dès lors que tous les détails supplémentaires ressortant des réponses de l'agent, et sur lesquels repose la délivrance du mandat, ont été consignés et certifiés dans la demande, la personne visée par la fouille ne subit aucun préjudice véritable du fait de l'enquête du juge de paix. Bien au contraire, cela renforce le caractère «judiciaire» du mandat qui offre alors une meilleure protection contre les atteintes injustifiées.

B. Les documents

RECOMMANDATION

13. Des formules types devraient être établies afin de supprimer les problèmes découlant à l'heure actuelle de l'improvisation dans la rédaction. Contrairement à la formule 1 actuelle, ces formules devraient aider l'agent à formuler tous les détails exigés par la loi. Elles devraient être rédigées dans une langue compréhensible et le jargon juridique devrait être évité. Les principes directeurs utilisés par la police devraient mettre en évidence le soin qu'il y a lieu d'apporter à la rédaction de la dénonciation et du mandat, plutôt qu'à celle des documents de nature purement administrative.

174. Malgré l'importance que l'on attache actuellement à l'aspect documentaire de la procédure, il est paradoxal de constater

que la législation apporte très peu d'éclaircissements en ce qui a trait aux documents qui doivent être utilisés par la police. Les seuls modèles existants sont ceux que l'on trouve dans le *Code*, relativement à la dénonciation et au mandat prévus à l'article 443. En outre, la présentation de la dénonciation type implique contradiction. En effet, alors que les dispositions de l'article 443 rendent obligatoire le recours à la formule 1, celle-ci est loin d'être conforme à tous les critères de fond et de preuve que contiennent ces dispositions. Dans l'affaire *Régina* v. *Colvin, Ex parte Merrick*, le juge Osler a fait le commentaire suivant:

> [TRADUCTION]
> Il convient de noter que l'utilisation de la formule 1 semble obligatoire, bien que cette formule, si on l'examine, laisse beaucoup à désirer .... [A]ux termes de l'article ... le juge de paix doit être convaincu que dans un lieu donné se trouve une chose «... qui, pour un motif raisonnable, porte à croire qu'elle fournira un élément de preuve touchant la perpétration d'une infraction ...». Or, la formule proposée n'est que de peu de secours à cet égard. Ainsi, la personne qui remplit la formule doit compléter une phrase qui commence par les mots: «Le dénonciateur déclare que», à la suite desquels il doit censément déclarer qu'il existe des motifs raisonnables de croire que certains objets fourniront la preuve d'un crime quelconque[219].

175. Comme nous l'avons déjà mentionné, plusieurs tentatives ont été faites[220] en vue de rendre la formule 1 conforme aux dispositions de l'article 443. En outre, comme la loi ne fournit aucun modèle pour les autres usages du mandat, les fonctionnaires locaux se sont vus dans l'obligation d'inventer les formules nécessaires, souvent en apportant des modifications à celle de l'article 443. Dans les deux cas, le produit de ces initiatives locales varie énormément, ce qui a eu de nombreuses conséquences.

176. En premier lieu, ce manque d'uniformité a eu une incidence sur le respect des conditions de forme. Ainsi, on en est venu à confondre les exigences des dispositions de l'article 443 et celles de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*. Par exemple, l'étude que nous avons menée en 1978 sur le mandat a révélé qu'à Edmonton, à Winnipeg et à Montréal, les mandats délivrés en matière de stupéfiants et de drogues n'énonçaient pas le nom de l'agent qui devait exécuter le mandat. En revanche, on avait souvent recours à une directive générale adressée aux agents de la paix de la circonscription territoriale, ce qu'autorisent les dispositions de l'article 443, mais non celles de la *Loi sur les stupéfiants* ni celles de la *Loi des aliments et drogues*. Quoique mineure en soi, cette irrégularité traduit un manque

d'attention manifeste, dans la mesure où elle constitue une contravention aux critères reconnus[221].

177. En second lieu, la forme matérielle du document peut influer sur la présentation des détails concernant le fond et la preuve. En effet, même si les exigences légales sont suivies à la lettre, l'espace réservé aux divers éléments de la formule et la présentation matérielle de celle-ci peuvent empêcher la mention de détails importants. À Montréal, par exemple, 33 des 35 ensembles de documents relatifs à l'article 443 étaient acceptables sur le plan de la forme. Pourtant, le type de formule utilisé par le Greffe de la paix et de la Couronne permet de comprendre pourquoi seulement 4 des 35 ensembles de documents étaient acceptables à d'autres égards: l'espace réservé à l'énumération des motifs raisonnables était nettement insuffisant. Par suite de cette enquête, on a tenté de remédier à la situation en ajoutant à la dénonciation une annexe visée par le serment de la personne. À Vancouver, en revanche, la formule était beaucoup plus dégagée, de façon à permettre l'addition de détails lorsque cela était nécessaire. Il n'est donc pas surprenant que le Comité des juges ait été en mesure de juger «raisonnables» les motifs énoncés dans 28 des 35 mandats délivrés à Vancouver en vertu des dispositions de l'article 443.

178. Les commentaires qui précèdent nous amènent à recommander l'adoption de deux mesures relativement simples. Tout d'abord, il convient de fournir, et même de rendre obligatoires, des formules types concernant tous les usages du mandat. Cela permettrait d'éviter les problèmes liés à l'improvisation incohérente dont les effets se font notamment sentir dans l'application pratique des mécanismes à caractère particulier. Si tant est que des régimes distincts doivent être conservés en vue de régler certaines situations particulières, ce qui est fort discutable, il y aurait lieu de réduire au minimum les disparités ainsi créées, grâce à l'instauration de documents spécifiques conçus en fonction de ces régimes. Par ailleurs, ces formules devraient être rédigées de façon à aider l'agent à donner tous les détails exigés par la loi. Nous verrons dans les paragraphes qui suivent les détails dont la mention devrait être exigée. Quoi qu'il en soit, même si les dispositions législatives actuelles devaient demeurer intactes, il resterait tout de même souhaitable de modifier la formule 1 du *Code criminel*.

179. Il ne suffit pas cependant de rendre ces documents conformes à la loi. Même lorsque les formules de dénonciation et de mandat sont établies de façon appropriée, il arrive souvent qu'elles soient rédigées dans une langue rébarbative et incompréhensible pour

le commun des mortels. Le mandat a pour but, entre autres, d'informer la personne visée par la perquisition du fondement de celle-ci[222]. Pourtant, les motifs qui sont à la base de la perquisition peuvent être masqués par le jargon ésotérique utilisé dans les formules prévues par le *Code criminel*: par exemple, les «attendu que», «ci-après», les adjectifs «ledit, lesdites», etc. On a tenté de justifier l'emploi de ce langage hermétique par le caractère [TRADUCTION] «extrêmement spécialisé» des questions en cause et des rapports entre ces questions[223]. Il ne fait aucun doute que les documents relatifs au mandat de perquisition doivent souvent comporter des détails très précis et complexes. Il reste cependant possible de rédiger des formules qui fassent état de ces détails d'une manière relativement compréhensible.

180. Enfin, reste la question de l'effet des exigences documentaires sur l'efficacité de la police. Les agents d'un certain nombre de forces de police canadiennes se sont plaints aux recherchistes de la Commission du fait qu'ils étaient submergés par la paperasserie. À Winnipeg, par exemple, les agents estimaient qu'il leur fallait compter une heure pour préparer les documents relatifs à chaque demande faite en vertu des dispositions de l'article 443. Il va sans dire que ce délai peut varier suivant les circonstances entourant chaque demande. Ainsi, dans le cas d'un crime économique complexe, la préparation de la dénonciation peut demander plusieurs jours. En revanche, vingt minutes peuvent suffire dans le cas de documents sommaires relatifs à une infraction concernant des biens volés. Certains des griefs des policiers visaient la nécessité de faire deux fois, dans la demande, puis dans la formule de mandat, la description des infractions, des objets et des lieux. Pourtant, la méthode utilisée au Greffe de la paix et de la Couronne de Montréal montre qu'il est possible de remédier à cet inconvénient au moyen de carbones et de formules appropriées. Quoi qu'il en soit, si l'efficacité est un objectif louable, elle ne doit pas être réalisée au détriment du caractère «judiciaire» de la délivrance du mandat, ni du caractère «spécifique» de la description des objets, des infractions et des lieux.

181. La pratique actuelle à Montréal montre également comment les formalités administratives de la police, bien plus que les exigences de la loi, peuvent multiplier la paperasserie liée aux fonctions de la police. Outre les documents nécessaires à l'obtention du mandat, l'agent de la paix de la C.U.M. doit en effet remplir, à des fins administratives, d'autres formules où il doit décrire les circonstances de la perquisition projetée. Non seulement celles-ci font double emploi, mais de plus, elles ont pour effet pratique de

réduire l'importance attachée aux documents exigés par la loi. Nous croyons que la nécessité de bien remplir les formules nécessaires à l'obtention du mandat devrait avoir priorité sur les formalités de nature administrative.

C. Le pouvoir discrétionnaire du juge de paix et le refus de délivrer le mandat

RECOMMANDATION

14. L'agent de la paix qui présente une demande de mandat devrait être tenu de divulguer dans la dénonciation toute demande antérieure visant l'obtention d'un mandat identique (par exemple: un mandat autorisant la fouille de la même personne, du même endroit ou du même véhicule, afin de découvrir des objets saisissables liés au même acte ou à un acte connexe).

182. Aux termes du paragraphe 443(1) du *Code criminel*, le juge de paix «peut» délivrer un mandat si la dénonciation énonce les «motifs raisonnables» requis. Comme le souligne Fontana, ce texte lui confère donc le pouvoir discrétionnaire de refuser de délivrer le mandat même si la dénonciation répond aux exigences de la loi:

> [TRADUCTION]
> L'emploi du mot «peut» confère implicitement un caractère discrétionnaire à ce pouvoir. Le juge de paix saisi d'une dénonciation faite sous serment de la manière prescrite peut refuser de délivrer le mandat de perquisition et ce, même s'il est «convaincu» au sens de cette disposition. Il revient alors à celui qui a présenté la demande de s'y prendre autrement[224].

Les dispositions des articles 101, 181, 182 et 353 du *Code*, de même que les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* confèrent également un pouvoir discrétionnaire semblable. En revanche, les dispositions des articles 160 et 281.3 ne semblent donner au juge aucun pouvoir discrétionnaire. Aux termes de ces dispositions, le juge de paix «doit» délivrer un mandat lorsqu'il est convaincu de l'existence des motifs prévus.

183. Nous sommes d'avis qu'en règle générale, la délivrance du mandat doit conserver son caractère discrétionnaire. En effet, ce caractère est conforme au rôle «judiciaire» qu'il convient, selon nous, d'attribuer à la personne chargée de la délivrance du mandat. Il

permet également la prise en considération des divers facteurs qui entrent en jeu lors de la délivrance. Parmi ces facteurs se trouve l'identité de la personne visée par la perquisition. Par exemple, le fait que la perquisition ait lieu dans les locaux d'un journal qui ne semble pas avoir participé à l'infraction n'empêche pas qu'il puisse exister des motifs raisonnables de croire que les objets saisissables se trouvent dans ces locaux. Cependant, comme on l'a laissé entendre dans l'affaire *Pacific Press*, cela peut être un facteur déterminant lorsqu'il s'agit de décider s'il est opportun de délivrer un mandat[225]. Le caractère discrétionnaire du pouvoir peut également être important lorsqu'il existe un doute sur la véracité des allégations contenues dans la dénonciation. L'existence de ce doute n'enlève pas aux motifs invoqués leur caractère «raisonnable», mais elle devrait permettre au juge de paix de rejeter la demande.

184. Le maintien du caractère discrétionnaire de ce pouvoir suppose que les personnes chargées de la délivrance des mandats sont en mesure de tenir une audition efficace sur la demande. Or, à la lumière des résultats de notre enquête sur le mandat, il est permis de se demander si une telle confiance est justifiée. Des études d'observateurs participants portant sur le travail de détective montrent non seulement que les juges de paix qui refusent de coopérer avec la police sont soumis à des pressions considérables, mais que de plus, les personnes chargées de la délivrance des mandats qui agissent de façon véritablement «judiciaire» sont l'exception plutôt que la règle[226]. Il n'en reste pas moins que le caractère judiciaire du processus de délivrance du mandat n'a rien de facultatif. Bien au contraire, il en constitue plutôt un objectif fondamental. Et si l'on doit d'emblée considérer cet objectif comme irréalisable, il y aurait lieu de remettre en question la valeur, non seulement du pouvoir discrétionnaire du juge, mais aussi des fondements mêmes du mécanisme.

185. Un aspect de la pratique actuelle semble contribuer à miner le caractère «judiciaire» du mécanisme: la recherche du magistrat le plus favorable à la délivrance du mandat. En effet, lorsque la délivrance d'un mandat est refusée, l'agent peut réitérer sa demande par la suite devant le même juge de paix ou devant un autre[227]. On peut soutenir que le fait de tolérer une telle situation rend illusoire l'exercice du pouvoir discrétionnaire. En revanche, nous ne croyons pas que le «danger d'être condamné deux fois», qui justifie l'application de la doctrine de la chose jugée dans les étapes subséquentes de la procédure, soit applicable au stade des fouilles, des perquisitions et des saisies. Les circonstances peuvent évoluer

après la première demande de mandat; on peut disposer de preuves plus convaincantes. De plus, si le rejet d'une demande initiale devait empêcher toute demande ultérieure au cours de l'enquête, les juges de paix pourraient avoir des scrupules à rejeter une demande apparemment mal fondée.

186. C'est pourquoi nous proposons une solution plus équilibrée, qui donne son plein effet au refus de délivrer un mandat tout en n'entravant pas l'exercice du pouvoir discrétionnaire. Cette solution s'inspire des dispositions de l'alinéa 178.12(1)*e*.1) du *Code criminel*, lesquelles exigent que les renseignements suivants figurent dans une déclaration faite sous serment et jointe à la demande visant à obtenir l'autorisation d'intercepter des communications électroniques:

> Le nombre de cas, s'il y a lieu, où une demande a été faite en vertu du présent article au sujet de l'infraction ou de la personne nommée dans la déclaration assermentée ... et où la demande a été retirée ou aucune autorisation n'a été accordée, la date de chacune de ces demandes et le nom du juge auquel chacune a été présentée;...

Nous recommandons que des exigences semblables soient établies dans le cas des demandes de mandats de perquisition.

D. Le critère applicable

RECOMMANDATIONS

15. L'agent de la paix qui demande la délivrance d'un mandat ne devrait pas être tenu de divulguer des faits pouvant révéler l'identité de sources confidentielles. Cependant, ce principe ne devrait pas avoir pour conséquence de permettre la délivrance d'un mandat fondé sur une demande qui ne satisfait pas au critère général des «motifs raisonnables».

16. L'article 178.2 du *Code criminel* devrait être modifié de façon à énoncer qu'il n'est pas interdit aux agents de la paix de révéler, lors d'une demande de mandat de perquisition, des faits dont ils ont eu connaissance grâce à l'écoute téléphonique.

(1) *Les motifs raisonnables*

187. Le critère traditionnel impose à la personne qui demande la délivrance d'un mandat de démontrer, après avoir prêté serment, l'existence de motifs raisonnables de croire qu'un objet donné, lié de la façon prescrite à la perpétration d'une infraction, est susceptible de se trouver dans un endroit donné. Ce critère reflète les caractères «judiciaire» et «spécifique» du mandat, caractères qui, comme le montre l'expérience, brillent souvent par leur absence dans la pratique. Bien que ce critère comporte en soi un certain degré d'imprécision, les problèmes semblent beaucoup plus liés à son application pratique.

188. On peut facilement scinder le critère en deux composantes: d'une part, la spécificité des objets, de l'infraction et des lieux, et d'autre part, les motifs raisonnables qui correspondent au caractère «judiciaire». Le critère de spécificité n'a pas toujours été appliqué de façon cohérente. Le degré exact de précision requis a même fait l'objet de controverses. Toutefois, de façon générale, ce critère ne pose plus de problème[228]. Les descriptions que contient la demande doivent être suffisamment circonstanciées pour permettre à la personne chargée de la délivrance du mandat de rendre une décision judiciaire. Puis, lorsqu'elles sont reportées sur le mandat, ces descriptions doivent guider l'agent qui exécute la perquisition et informer la personne visée de l'étendue de l'atteinte qui peut être portée à ses droits[229]. Même s'il existe toujours une certaine confusion en jurisprudence, les normes actuelles sont relativement bien établies[230]. Ce sont plutôt les «motifs raisonnables» qui posent des difficultés.

189. Qu'entend-on par «motifs raisonnables»? Bon nombre de tribunaux ont tenté de répondre à cette question, souvent par comparaison avec d'autres critères légaux. Ainsi, depuis la décision rendue dans l'affaire *Re Newfoundland and Labrador Corp. Ltd.*, il est clair que le critère des «motifs raisonnables» impose un fardeau moins lourd que celui de «prouver hors de tout doute raisonnable[231]». Mais cette distinction sémantique constitue une piètre réponse. Sans doute vaudrait-il mieux considérer ce critère comme un guide. Dans la mesure où le «caractère raisonnable» témoigne du souci d'objectivité et de réflexion inhérent au «caractère judiciaire», il évoque de façon suffisamment claire les obligations de la personne chargée de la délivrance du mandat.

190. Le critère des «motifs raisonnables» a manifestement été appliqué de façon incohérente, tant par les personnes chargées de la

délivrance des mandats que par les tribunaux chargés de la révision. Par exemple, dans la décision qu'elle a rendue récemment dans l'affaire *Abou-Assale*, la Cour supérieure du Québec a jugé que les mots [TRADUCTION] «enquête effectuée par la Gendarmerie royale du Canada» satisfaisaient au critère[232]. Pourtant, quinze ans auparavant, le même tribunal avait jugé insuffisant, dans l'affaire *Regency Realties Inc.* v. *Loranger*, un motif formulé ainsi: «informations d'une personne digne de foi», dans la mesure où ce motif ne contenait «aucune information sérieuse[233]». Au regard de telles volte-face, il n'est pas étonnant que dans la circonscription territoriale de Montréal, les juges de paix aient adopté un critère assez souple[234]. Par ailleurs, il n'est pas facile de réconcilier ces décisions à partir des «circonstances de l'espèce», celles-ci étant souvent identiques à toutes fins utiles. Dans une certaine mesure, de telles contradictions sont inévitables puisqu'elles reflètent les différentes préoccupations des juges et des tribunaux. Quoi qu'il en soit, la détermination des motifs raisonnables pose des problèmes fondamentaux qui exigent l'établissement de principes de base. Parmi ces problèmes se trouvent, d'une part, le recours aux renseignements provenant de sources confidentielles, et d'autre part, l'utilisation d'informations obtenues grâce à l'écoute téléphonique.

(2) *Les sources confidentielles*

191. Le droit positif canadien au sujet des sources confidentielles a été formulé dans l'affaire *Lubell*, dans laquelle le juge Zuber a ratifié un mandat fondé sur des [TRADUCTION] «renseignements obtenus d'une source fiable»:

> [TRADUCTION]
> Il est bien connu en droit que la Couronne jouit d'un privilège relativement à la divulgation du nom des dénonciateurs. C'est évidemment pour cette raison que l'on se réfugie derrière un tel langage[235].

Cette position peut sembler avoir pour effet de sacrifier l'obligation de découvrir la vérité, laquelle est intrinsèquement liée au caractère judiciaire du mandat, à l'intérêt pour la police de cacher certains faits. Pourtant, même lors du procès, l'identité des sources est généralement protégée pour des motifs d'intérêt public. En effet, l'anonymat encourage les informateurs à transmettre à l'État des renseignements concernant les infractions criminelles[236]. En outre, même si l'identité de l'informateur peut avoir une incidence sur la

crédibilité du requérant, le secret n'empêche pas le juge de paix de remplir sa fonction judiciaire.

192. Il existe une différence entre le fait de garder secrète l'identité de la source, et celui d'empêcher l'examen des motifs fournis par cette personne. La Cour d'appel de Terre-Neuve a reconnu cette distinction dans l'arrêt *Newfoundland and Labrador Corp. Ltd.*: [TRADUCTION] «Il est certain que les renseignements contenus dans la formule 1, où le dénonciateur témoigne de faits précis qui lui ont été communiqués [par une personne dont l'identité est gardée secrète], peuvent permettre au juge de paix d'être convaincu de l'existence de motifs raisonnables[237]». Ce raisonnement est fort juste. Exiger moins reviendrait à compromettre, en faveur du pouvoir discrétionnaire de la police, la possibilité pour la personne qui délivre le mandat de s'assurer du bien-fondé de la demande. Nous croyons donc qu'il faut continuer à reconnaître le droit de taire l'identité du dénonciateur lors de l'audition de la demande de mandat, mais qu'il faut par ailleurs restreindre ce droit, de façon à lui donner une portée plus rationnelle. En effet, le respect de l'anonymat (au moyen de pseudonymes ou autrement) ne doit pas soustraire celui qui demande la délivrance du mandat à l'obligation de présenter des faits satisfaisant au critère des «motifs raisonnables».

(3) *Les renseignements obtenus grâce à l'écoute électronique*

193. Un autre problème, jusqu'à un certain point lié au précédent, se pose lorsque la police veut effectuer une perquisition en se fondant sur des renseignements obtenus grâce à l'écoute électronique. En principe, il n'existe aucune raison pour que ce cas échappe à l'application du critère des «motifs raisonnables». En pratique cependant, les policiers hésitent souvent à divulguer les renseignements eux-mêmes, de même que le fait que ceux-ci ont été obtenus au moyen de l'écoute électronique, tant pour ne pas compromettre le succès de leur enquête qu'en raison de l'interdiction légale qui empêche la divulgation de l'interception des communications privées.

194. Voici le libellé du paragraphe 178.2(1) du *Code criminel*:

> Lorsqu'une communication privée a été interceptée au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre sans le consentement, exprès ou tacite, de son auteur ou de la personne à laquelle son auteur les destine, quiconque
>
> *a)* utilise ou divulgue volontairement tout ou partie de cette communication privée, ou la substance, le sens ou l'objet de tout ou partie de celle-ci, ou

b) en divulgue volontairement l'existence,

sans le consentement exprès de son auteur ou de la personne à laquelle son auteur la destinait, est coupable d'un acte criminel et passible d'un emprisonnement de deux ans.

Les résultats de l'étude de la Commission sur les mandats, de même que les consultations tenues par la suite, révèlent que l'interprétation donnée à cette interdiction varie d'une ville à l'autre, et même au sein de certaines forces policières. Par exemple, certains agents préparent des dénonciations faisant allusion à [TRADUCTION] «l'interception de communications privées de personnes dont le nom ne peut être révélé pour le moment». Les représentants d'un certain nombre de forces de police se sont toutefois dits d'avis qu'un agent de police ne peut même pas révéler au juge de paix l'existence d'un processus d'écoute électronique sans contrevenir aux dispositions du paragraphe 178.2(1). Même si les dispositions du paragraphe 178.2(2) rendent l'interdiction inapplicable aux «poursuites pénales» et aux «autres procédures» où la personne est «requise de déposer sous serment», les représentants locaux se sont dits sceptiques quant à l'application de cette exemption aux demandes de mandats de perquisition.

195. Il convient de clarifier les rapports qui existent entre les dispositions de l'article 178.2 et les exigences relatives au mandat de perquisition. D'une part, ces dispositions visent expressément à protéger la vie privée de l'auteur de la communication privée, en empêchant la divulgation de celle-ci. Elle *n'a pas* pour objet d'empêcher les personnes qui ont pris part à la communication d'être informées des activités de la police. L'existence de ce principe est attestée par les dispositions de l'article 178.23, qui imposent l'obligation d'aviser par écrit les personnes concernées dans un certain délai. Comme il existe de toute façon une certaine ambiguïté, il y aurait peut-être lieu de modifier le paragraphe 178.2(2) afin de préciser que les dispositions du paragraphe (1) ne s'appliquent pas à la procédure relative à l'obtention du mandat de perquisition. Il importe en effet d'éviter qu'une disposition dont le but est de protéger la vie privée des citoyens ne nuise à l'application d'une autre disposition comportant un objectif semblable.

196. Cette réflexion soulève une question plus importante: quelle incidence l'existence d'une écoute électronique doit-elle avoir sur l'application du critère des «motifs raisonnables»? Nous estimons que le recours à l'écoute électronique, tout comme l'utilisation de renseignements provenant de sources confidentielles, ne justifie aucune dérogation à la règle. L'agent de la paix doit exposer au juge de paix les faits à l'appui de sa demande. En réalité, les réticences

qu'éprouvent actuellement les agents de police à divulguer l'existence d'un processus d'écoute électronique font que la dénonciation fondée sur des renseignements ainsi obtenus est considérée de la même façon que toute autre dénonciation par le tribunal saisi d'une demande de révision[238]. Cette uniformité dans l'application devrait être maintenue, non seulement par les tribunaux, mais aussi par les personnes chargées de délivrer les mandats. Il est vrai que le législateur a lui-même encouragé la préservation du caractère occulte de l'écoute électronique, comme en font foi les dispositions de l'article 178.23 qui établissent un délai relativement à l'avis. Toutefois, la multiplication des cas où des faits peuvent être gardés secrets comporte certains risques. Poussée à l'extrême, une telle politique pourrait éventuellement justifier des enquêtes et des procès clandestins.

197. Comme dans le cas des sources anonymes, il convient de distinguer la divulgation de faits pouvant révéler l'existence d'un processus d'écoute électronique, et la divulgation de renseignements obtenus grâce à l'écoute électronique au sujet d'activités criminelles. Ce sont les faits de cette seconde catégorie et non ceux de la première qui peuvent constituer des «motifs raisonnables». Le risque de rendre inefficace un processus d'écoute électronique en cours par la divulgation d'un fait de la seconde catégorie est de toute façon une conséquence probable de l'exécution du mandat. Il est en effet difficile de croire que la personne dont la demeure a fait l'objet d'une perquisition ne soupçonnera pas que ses communications puissent être surveillées.

E. La personne chargée de la délivrance des mandats

RECOMMANDATION

17. Le pouvoir du juge de paix de délivrer des mandats de perquisition ne devrait pas être dissocié de ses autres fonctions judiciaires. Il importe de s'assurer de la compétence et de l'indépendance des personnes habilitées par le *Code criminel* à exercer des pouvoirs judiciaires importants. Les provinces devraient prendre l'initiative de réexaminer la charge de juge de paix et, au besoin, soit l'abolir, soit la redéfinir.

198. Les personnes qui délivrent les mandats de perquisition, du moins celles qui agissent en vertu des dispositions des articles 443

et 181 du *Code*, ou de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, passent souvent outre aux critères légaux qui régissent l'exécution de leurs fonctions. Il est alors permis de se demander s'il ne serait pas préférable de confier cette responsabilité à d'autres fonctionnaires que ceux que désigne la législation actuelle.

199. En matière criminelle, la délivrance de la plupart des mandats de perquisition est confiée au juge de paix[239]. Aux termes de l'article 2 du *Code criminel*, le terme «juge de paix» désigne tant un magistrat qu'un juge de paix. Par ailleurs, en vertu de certains textes législatifs provinciaux, les juges des cours supérieures ont, d'office, les pouvoirs d'un juge de paix[240]. L'enquête menée par la Commission sur les mandats révèle qu'en pratique, la charge de délivrer les mandats de perquisition semble en général partagée par les juges de paix, les magistrats et les juges des différentes cours provinciales. Au Nouveau-Brunswick, c'est-à-dire dans l'une des provinces visées par l'enquête, on a aboli la charge de juge de paix. Les mandats de perquisition y sont délivrés exclusivement par les juges de la Cour provinciale[241].

200. On reproche souvent aux juges de paix de ne pas avoir l'impartialité ni la compétence requises pour délivrer les mandats de perquisition. Dans le rapport Kirby, intitulé *Administration of Justice in the Provincial Courts of Alberta*, les auteurs se sont exprimés sans ambages:

> [TRADUCTION]
> Il est possible de présenter une dénonciation en vue de l'obtention d'un mandat de perquisition à des commis ou à des agents de police qui ont été nommés juges de paix. Comme la délivrance d'un mandat de perquisition constitue un acte judiciaire qui exige la compétence, l'impartialité et l'indépendance judiciaires, les juges de paix ne devraient pas être investis de ce pouvoir[242].

Selon le même rapport, la délivrance des mandats devrait appartenir exclusivement aux juges de la Cour provinciale. Bien que cette recommandation puisse sembler très convaincante, deux facteurs doivent tout de même être pris en considération.

201. En premier lieu, les données recueillies au cours de l'enquête de la Commission portent à croire que le fait de donner aux juges des cours provinciales une compétence exclusive n'améliorerait pas la situation de façon marquée. Au Nouveau-Brunswick, comme nous l'avons mentionné, les mandats sont délivrés exclusivement par les juges de la Cour provinciale. Or, parmi les douze mandats étudiés[243], le taux de validité était *inférieur* à celui des autres

provinces, c'est-à-dire 27 pour cent comparativement à 39 pour cent. En revanche, à Vancouver, où le taux de validité était le plus élevé, seuls des juges de paix avaient eu à statuer sur les demandes de mandats. À Edmonton, la seule ville où il a été possible de comparer le taux de validité des mandats délivrés par les juges de paix par rapport à celui des mandats délivrés par des juges de la Cour provinciale, le premier était presque aussi élevé que le second, soit 33 pour cent par rapport à 35 pour cent. À cause de l'échantillon réduit, ces données statistiques ont une valeur limitée. Elles montrent néanmoins que l'on aurait tort d'accorder trop d'importance à la position occupée par la personne chargée de la délivrance des mandats. Il y aurait plutôt lieu de tenir compte de la compétence du fonctionnaire à remplir son rôle et de voir si la structure administrative qui l'entoure est propice à l'exécution de ses fonctions.

202. En second lieu, ce serait faire fausse route que de croire que les fonctions de nature décisionnelle des juges de paix ne concernent que les mandats de perquisition. Certes, la délivrance d'un mandat peut être lourde de conséquences. Cependant, le juge de paix remplit d'autres fonctions qui peuvent avoir des suites encore plus graves. En vertu des dispositions actuelles du *Code*, il peut en effet délivrer des mandats d'arrestation, ordonner qu'un prévenu soit mis sous garde, tenir une enquête préliminaire, ordonner l'incarcération d'une personne, et rendre jugement dans le cas d'infractions punissables sur déclaration sommaire de culpabilité[244]. Retirer au juge de paix ses pouvoirs en matière de mandat de perquisition tout en lui laissant les autres reviendrait à contourner la difficulté. Il convient plutôt de se demander s'il est opportun d'attacher des responsabilités judiciaires importantes à la charge de juge de paix telle qu'elle est conçue actuellement.

203. Il est bien connu que bon nombre de juges de paix travaillent en étroite collaboration avec les agents de la paix qui présentent les demandes de mandats. De fait, de nombreux juges de paix sont d'anciens agents de police dont la formation juridique est très limitée. Le rapport Pringle fait état d'un incident illustrant le climat de familiarité qui peut s'installer dans de telles conditions. En l'occurrence, deux agents de police avaient obtenu deux mandats de perquisition d'un juge de paix qui avait lui-même été agent de police. Lorsque l'on demanda au juge de paix de produire les dénonciations qui avaient donné lieu à la délivrance des deux mandats, celui-ci n'a pu le faire. Il a tenté de se justifier en prétendant que rien ne l'obligeait à conserver ces documents une fois les mandats

délivrés[245]. Cette méconnaissance des règles fondamentales du caractère judiciaire a amené de nombreux observateurs à mettre en doute la compétence de nombreux juges de paix[246]. Pourtant, au moins une province canadienne a établi un système dans lequel les juges de paix prennent leurs responsabilités judiciaires au sérieux. Ainsi, les recherchistes de la Commission ont pu constater qu'en Colombie-Britannique, les juges de paix étaient formés au sein du système d'administration des tribunaux, étaient choisis par un conseil de la magistrature, et pouvaient bénéficier d'un programme d'éducation permanente concernant leurs fonctions.

204. Néanmoins, les problèmes ne sont pas liés exclusivement à la compétence individuelle des juges de paix. De façon générale, on peut également se demander s'il est opportun de conférer des fonctions judiciaires à un fonctionnaire le plus souvent placé dans une position dépendante, ce que l'on a toujours tenté de faire depuis l'époque de Hale. Certaines lois provinciales font des procureurs de la Couronne les «conseillers» des juges de paix[247]. À ce titre, les procureurs de la Couronne peuvent à bon droit influencer la décision rendue sur les plaintes privées. Mais la portée de ce pouvoir doit-elle s'étendre aux demandes présentées par la police? La loi semble sanctionner ce pouvoir et de ce fait, placer le juge de paix dans une situation de conflit: le juge de paix doit en principe rendre une décision «judiciaire» sur la demande, dans une affaire où son «conseiller» est susceptible d'être le poursuivant.

205. Les questions de la nomination, des compétences, de la formation et de la responsabilité des juges de paix ont été étudiées en profondeur en Grande-Bretagne[248]. En outre, les tribunaux américains se sont récemment fait un point d'honneur d'assurer l'impartialité des juges de paix, et sont même allés jusqu'à déclarer invalides des mandats qui avaient été délivrés par des procureurs généraux d'États, agissant à titre de juges de paix[249]. Au Canada, les provinces ont examiné ce problème qui, sur le plan constitutionnel, relève de leur compétence en ce qui a trait aux juges des cours provinciales, aux magistrats et aux juges de paix[250]. À l'instar de l'évolution historique de la charge de juge de paix, les problèmes liés à celle-ci varient d'une région à l'autre, et nous ne prétendons pas avoir trouvé une solution idéale à ces problèmes. Que celle-ci consiste à abolir la charge de juge de paix ou à la redéfinir, il importe que les provinces prennent les mesures appropriées afin d'instaurer des changements réels. Comme toutes les autres fonctions à caractère décisionnel prévues par le *Code criminel*, la délivrance des mandats de perquisition n'a que le caractère «judiciaire» de celui qui en est chargé.

F. Le rôle du procureur de la Couronne

RECOMMANDATION

18. Une participation accrue des procureurs de la Couronne et des avocats mandatés par les forces de police pourrait améliorer la qualité des demandes de mandats. Toutefois, cette participation de la Couronne devrait rester discrétionnaire. Les personnes chargées de la délivrance des mandats devraient se sentir libres de requérir la participation de la Couronne. En outre, le rôle de la Couronne devrait être celui d'une partie qui expose ses prétentions et non celui d'un conseiller juridique auprès du juge de paix.

206. À l'heure actuelle, rien n'exige expressément que le procureur de la Couronne prenne part à la demande du mandat de perquisition et, le plus souvent, l'agent de la paix agit sans l'aide d'un avocat. La seule exception digne de mention est celle des perquisitions qui ont lieu en matière de crimes économiques. Les procureurs de la Couronne et les avocats dont les services ont été retenus par la police peuvent apporter une aide précieuse à celle-ci aux fins de l'enquête, avant que la perquisition ne soit effectuée, et leurs connaissances peuvent être très utiles dans la préparation des documents relatifs aux mandats qui sont alors complets et bien circonstanciés. On peut donc penser qu'une participation accrue des conseillers juridiques pourrait améliorer la qualité des demandes et du même coup, le système de délivrance des mandats dans son ensemble. Reconnaissant le bien-fondé de cette hypothèse, les auteurs du rapport Kirby ont recommandé qu'en Alberta, toutes les demandes de mandats de perquisition soient préparées par les procureurs de la Couronne[251].

207. Outre les raisons pratiques qui militent en faveur de la participation de la Couronne, on peut invoquer un argument plus théorique. En effet, puisque l'administration du droit pénal au jour le jour relève du ministère du procureur général, il serait logique qu'un représentant de ce ministère soit présent lorsque l'on prend la décision de recourir au mécanisme du mandat pour l'application du droit pénal. Du reste, ce rôle de surveillance est déjà reconnu implicitement par les dispositions de l'article 281.3 du *Code criminel*, lesquelles exigent que le consentement du procureur général soit obtenu avant que puisse être présentée une demande visant la délivrance d'un mandat destiné à saisir de la propagande haineuse. Devrait-on faire de cette exigence une règle générale?

208. Dans son document de travail intitulé *Les poursuites pénales: responsabilité politique ou judiciaire*, la Commission recommandait d'imposer à la Couronne la responsabilité de participer à toutes les étapes de la poursuite pénale, y compris celle qui consiste à assurer la présence du prévenu devant le tribunal. En effet, il semblait absurde «qu'une affaire puisse atteindre l'étape de la comparution devant un tribunal, sans que l'accusation ait reçu l'approbation de celui-là même à qui incombe en dernière analyse la responsabilité des décisions en matière de poursuite[252]». Par analogie, on pourrait prétendre qu'avant même le stade de la comparution, la Couronne devrait être tenue d'affirmer que les biens saisis sont détenus à des fins légitimes. D'ailleurs, aux termes du paragraphe 446(1) du *Code* actuel, une déclaration sur l'état de l'enquête doit obligatoirement être faite dans les trois mois de la saisie.

209. Cela ne signifie pas, toutefois, que la Couronne doive assumer la responsabilité de toutes les demandes de mandats de perquisition. En effet, une telle exigence ajouterait à la complexité du processus, rendrait impossible la présentation d'une demande de mandat dans certains cas, et inciterait ainsi la police à se livrer à des perquisitions sans mandat. Signalons qu'à la suite des recommandations contenues dans le rapport Kirby, on a établi un système de vérification auquel la Couronne devait participer. En pratique cependant, un fonctionnaire du ministère public a qualifié ce système d'«utopique». Indépendamment de ces difficultés administratives et pratiques, la perquisition avec mandat relève plus de l'enquête que de la poursuite. En effet, si la perquisition permet de découvrir des renseignements qui peuvent donner lieu au dépôt d'une accusation, elle ne constitue pas, en soi, une étape préalable à l'accusation ou concomitante de celle-ci. On aurait donc tort d'interpréter les critères proposés par la Commission comme rendant obligatoire la participation de la Couronne lors de l'amorce du processus.

210. Nous croyons cependant qu'il serait utile, en pratique, d'établir des mécanismes administratifs permettant aux procureurs de la Couronne d'intervenir dans le cas des demandes complexes. De plus, la présence d'un représentant du procureur général à l'audition de la demande, soit pour soutenir celle-ci, soit pour s'y opposer, s'inscrit parfaitement dans le cadre des responsabilités du procureur général, en tant que responsable de l'administration de la justice pénale. Ainsi, il y aurait lieu de sanctionner la pratique actuellement en vigueur dans certaines circonscriptions, suivant laquelle les personnes chargées de délivrer les mandats signalent au procureur de

la Couronne les cas qui font problème, notamment du point de vue constitutionnel. Par ailleurs, afin de bien marquer le caractère judiciaire de la fonction du juge de paix, il importe d'insister sur le fait que lors de la présentation de la demande, la Couronne ne doit pas jouer le rôle d'un conseiller, mais celui d'une partie exposant ses prétentions. S'il est vrai qu'une plus grande participation des procureurs de la Couronne et d'autres avocats est susceptible d'améliorer la qualité des demandes, il n'en reste pas moins que seules l'indépendance et la diligence des personnes chargées de délivrer les mandats peuvent assurer le caractère judiciaire du processus.

G. Le télémandat

RECOMMANDATION

19. Un mécanisme de télémandat semblable à celui que prévoient les "American Federal Rules" devrait être institué au Canada. Un télémandat ne devrait pouvoir être obtenu que s'il existe des motifs justifiant la délivrance d'un mandat ordinaire aux termes de la recommandation 11, mais que le recours aux mécanismes habituels soit matériellement impossible. Ce mécanisme devrait comporter des garanties permettant à la personne visée d'avoir par la suite accès au dossier, et assurant que le mandat exécuté par l'agent de la paix est identique à celui qu'a autorisé le juge de paix.

211. On retrouve le mécanisme du télémandat ou du mandat verbal dans de nombreux codes de procédure pénale américains, y compris les règles fédérales. Ce mécanisme a en outre été adopté par la Commission de réforme du droit australienne qui y a vu [TRADUCTION] «l'application normale d'un outil moderne» à des situations d'urgence, ou à des cas où un magistrat n'est pas disponible[253]. Or, de telles situations peuvent aussi se produire au Canada, aussi bien dans les villes que dans les régions rurales. Lorsqu'un agent découvre un objet ou des renseignements liés à la perpétration d'une infraction, il peut lui être difficile de quitter les lieux pour obtenir un mandat sans risquer que des objets saisissables soient soustraits à la saisie. Pourtant, en règle générale, l'agent de la paix n'a aucun moyen légal de les saisir à moins d'arrêter l'occupant et de procéder à la saisie accessoirement. Or, dans les cas où il n'existerait aucun motif d'arrestation, la seule autre solution

consisterait pour l'agent à obtenir l'aide d'autres policiers qui garderaient les lieux en attendant la délivrance du mandat.

212. De telles embûches pourraient souvent être évitées grâce au mécanisme du télémandat. Voici le fonctionnement du mécanisme établi par les dispositions du paragraphe 41(c)(2) des règles fédérales américaines:

> [TRADUCTION]
> (A) Règle générale: si les circonstances sont telles qu'il est raisonnable de ne pas exiger une déclaration écrite sous serment, un magistrat fédéral peut délivrer un mandat en se fondant sur une déposition verbale faite sous serment ou par un autre moyen convenable.
>
> (B) La demande: la personne qui demande la délivrance du mandat doit préparer un duplicata du mandat et le lire mot à mot au magistrat fédéral. Ce dernier doit transcrire mot à mot sur l'original du mandat le texte qui lui est lu. Le magistrat fédéral peut ordonner que des modifications soient apportées au mandat.
>
> (C) La délivrance: si le magistrat fédéral est convaincu que les circonstances sont telles qu'il est raisonnable de ne pas exiger de déclaration écrite sous serment, et qu'il existe des motifs à l'appui de la demande ou qu'il y a de bonnes raisons de croire que de tels motifs existent, il ordonne alors la délivrance du mandat en demandant à la personne qui en fait la demande de signer le duplicata en son nom. Le magistrat fédéral doit immédiatement signer l'original du mandat et inscrire l'heure précise à laquelle il a ordonné la délivrance du mandat. Dans le cas d'une demande verbale, l'existence des motifs raisonnables de délivrer un mandat peut être prouvée de la même façon que dans le cas d'un mandat demandé au moyen d'une déclaration écrite.

213. Le mécanisme du télémandat présente deux avantages. En premier lieu, dans la mesure où il supprime notamment les délais de déplacement et de préparation de la demande écrite, il rend l'exécution plus expéditive. D'après la jurisprudence américaine, il est possible d'obtenir un mandat verbal en aussi peu que dix minutes[254]. En second lieu, comme le mandat peut être obtenu n'importe où, il permet à l'agent de rester sur les lieux où se trouvent les choses saisissables. Ces deux avantages rendent souhaitable l'établissement du mécanisme du télémandat pour les cas où le recours aux méthodes habituelles pourrait entraîner la perte des objets. Par voie de conséquence, ils facilitent le recours au mandat. Il y a cependant lieu de se demander dans quelle mesure ces innovations pourraient battre en brèche les garanties que comporte le mécanisme du mandat.

214. Pour ce qui est de la «spécificité» du mandat, les critères sont les mêmes à toutes fins utiles. Suivant la règle fédérale

américaine 41(c)(2)(E), le contenu du mandat délivré à partir d'une déposition verbale doit être le même que celui du mandat habituel. Le fait de ne pas avoir à présenter de demande écrite décrivant l'infraction, les biens et les lieux, ne dispense pas la personne qui fait la demande de fournir ces détails. Au contraire, l'agent doit le faire verbalement afin que celui qui délivre le mandat puisse inscrire les détails sur son exemplaire. Puisque selon le droit canadien, les critères de spécificité applicables à la dénonciation et au mandat sont interchangeables, le fait de dicter les renseignements en une seule fois plutôt que de les présenter sur deux documents ne saurait entraîner un relâchement des critères. La conservation de l'original du mandat par la personne qui le délivre assure la conformité du mandat avec les descriptions dictées.

215. En revanche, certains problèmes se posent en ce qui a trait au caractère «judiciaire» du mandat. En effet, bien que le critère des «motifs raisonnables» reste le même, ses modalités d'application varient quelque peu. En premier lieu, la personne qui délivre le mandat ne dispose d'aucun document écrit pouvant l'aider à rendre sa décision. Il existe, cela va sans dire, des cas complexes où en l'absence de motifs écrits et bien articulés, il est difficile de déterminer le bien-fondé de la demande. Dans des cas semblables, comme d'une part, la personne qui demande le mandat peut éprouver des difficultés à formuler ces motifs verbalement et que, d'autre part, c'est à cette dernière qu'il appartient de démontrer que sa demande est fondée sur des motifs raisonnables, d'après les règles fondamentales régissant la délivrance du mandat, la demande devrait en principe être rejetée. De plus, les cas vraiment complexes auront sans doute fait l'objet d'une enquête longue et méticuleuse. Il est alors douteux que la situation soit «urgente» au point de justifier une dérogation à l'obligation de présenter une demande écrite.

216. Quoi qu'il en soit, dans la plupart des cas, le principal avantage de la demande écrite ne réside pas vraiment dans l'aide que celle-ci fournit à la personne chargée de délivrer le mandat, mais bien dans le fait que cette demande permet la constitution d'un dossier. Par conséquent, s'il est possible de constituer un dossier autrement, les problèmes qui découlent de l'absence d'une demande écrite se trouvent réglés. La solution la plus évidente est sans doute la transcription de la déposition. Étant donné que la demande de télémandat est à la fois exceptionnelle et généralement brève, il ne semble pas déraisonnable d'exiger qu'une transcription de la déposition soit préparée sans délai. Par la suite, la transcription de la déposition serait jointe au mandat tout comme une demande écrite.

En organisant et en centralisant l'application du mécanisme, il est possible de s'assurer qu'un sténographe, de même que l'équipement nécessaire, se trouvent à la disposition de la personne chargée de la délivrance des mandats. On pourrait par exemple prévoir qu'il y ait toujours un juge de paix disponible, et que celui-ci dispose de l'équipement et du personnel nécessaires[255].

217. En second lieu, on peut prétendre que la présentation de la demande par téléphone empêche la personne qui délivre le mandat d'observer la conduite de celui qui en fait la demande. Sans en nier l'existence, il est permis de s'interroger sur l'importance réelle de ce facteur. Dans la mesure où il s'agit d'un processus essentiellement documentaire, la conduite du demandeur n'a d'importance que lorsque celui-ci prête serment et répond aux questions qui lui sont posées. En outre, comme l'a souligné un auteur américain[256], la connaissance qu'a l'agent de police des rouages de ce mécanisme fait en sorte que la conduite de ce dernier devient un critère sans intérêt dans l'appréciation du bien-fondé de la demande. Si le comportement soulève un doute, celui-ci peut très bien être discerné, soit par la qualité de la présentation verbale, soit par la cohérence des allégations de celui qui fait la demande. En somme, l'importance de ce facteur semble minime.

218. Ainsi, un mécanisme de télémandat comportant des garanties appropriées peut revêtir le même caractère «judiciaire» que le mécanisme traditionnel. En outre, des guides de présentation des demandes verbales, comme ceux qui sont utilisés à San Diego (Californie)[257] compensent l'absence de document, et constituent des exemples d'enquêtes efficaces sur le bien-fondé des demandes de mandat. Dans plusieurs régions canadiennes, surtout dans les régions du nord, on a déjà recours au téléphone, notamment dans le cas des demandes de cautionnement et des requêtes civiles par défaut. En conséquence, nous recommandons que la possibilité d'obtenir un mandat de perquisition par téléphone ou autre mode de communication soit reconnue par le droit canadien. Toutefois, comme l'usage du mandat téléphonique n'est justifié que lorsqu'il est matériellement impossible d'obtenir un mandat de la façon habituelle, le télémandat ne devrait pouvoir être obtenu que lorsque le demandeur est en mesure de démontrer l'impossibilité de procéder autrement.

219. En conclusion, il importe de reconnaître que si l'invention du téléphone a créé de nouvelles façons de transmettre certains pouvoirs, les développements technologiques pourraient bien un jour rendre désuet le mécanisme proposé dans ce document. Par exemple, s'il devenait possible de transmettre à l'agent de la paix une copie du

mandat signée par le juge de paix au moyen d'un terminal se trouvant dans la voiture du policier, ce dernier n'aurait plus à recopier les directives de la personne qui délivre le mandat. En somme, le droit doit être suffisamment souple pour s'adapter aux changements technologiques et en tirer profit.

II. L'exécution des mandats

A. Les agents de la paix et les particuliers

RECOMMANDATION

20. Le simple citoyen devrait continuer d'être en droit de demander la délivrance d'un mandat de perquisition. Cependant, une fois la perquisition autorisée par celui qui est chargé de la délivrance du mandat, la police devrait avoir l'entière responsabilité de l'exécution du mandat. L'agent de la paix devrait être habilité à emmener à l'endroit ou au véhicule où a lieu la perquisition tout citoyen, s'il croit pour des motifs raisonnables que la présence de celui-ci est nécessaire à la bonne exécution du mandat.

220. À l'exception des mandats délivrés en vertu des dispositions relatives aux métaux précieux, et de celles de l'article 443, tout mandat de perquisition doit être exécuté par un agent de la paix. De fait, le pouvoir du simple citoyen d'exécuter un mandat n'existe plus qu'en théorie. Les dispositions relatives aux métaux précieux semblent rarement utilisées, et parmi les mandats soumis à l'enquête nationale, aucun n'avait été exécuté par un particulier. Il y a donc lieu de se demander si le pouvoir du simple citoyen d'exécuter un mandat doit être maintenu dans la loi.

221. Les dispositions qui prévoient l'exécution des mandats par les particuliers, du moins celles de l'article 443, semblent être le produit d'une déformation historique du mandat de common law de Hale. Ce dernier avait reconnu lui-même qu'il était souhaitable de ne confier à la partie lésée qu'un rôle de conseiller auprès du constable chargé de l'exécution[258]. Par la suite, d'autres auteurs ont signalé qu'en fait, des mandats étaient délivrés aussi bien à de simples

citoyens qu'à des constables[259]. À notre époque, où les perquisitions se justifient, non plus par l'affirmation des droits privés, mais bien par l'application du droit pénal, l'exécution du mandat par un particulier est devenue un anachronisme. La loi reconnaît toujours au citoyen certains pouvoirs à caractère attentatoire dans le cas de l'arrestation. Cependant, ces pouvoirs ne peuvent être exercés que dans des situations d'urgence ou lors de la découverte soudaine d'une infraction, et sont limités par l'obligation qu'a le citoyen de remettre le prévenu entre les mains d'un agent de la paix[260]. Aucune disposition du *Code criminel* ne permet la délivrance d'un mandat d'arrestation à un particulier, et il serait difficile de justifier l'existence d'un tel pouvoir en matière de fouilles, de perquisitions et de saisies.

222. Quoi qu'il en soit, cela ne signifie pas qu'il faille priver le simple citoyen du droit de déposer une dénonciation sous serment, en vue de mettre en branle le mécanisme de perquisition avec mandat. En effet, le droit du citoyen d'amorcer des poursuites est un élément fondamental de tous les mécanismes de la procédure pénale. Déjà dans l'affaire *Hetu* v. *Dixville Butter and Cheese Association*, le juge en chef Fitzpatrick, parlant au nom de la Cour suprême du Canada, affirmait le droit du citoyen d'intenter des poursuites: [TRADUCTION] «La présentation d'une dénonciation, lorsqu'on a connaissance de faits suffisants pour croire de bonne foi à la culpabilité d'une personne, ne constitue pas une faute, mais l'exercice d'un droit indiscutable[261]». Reconnaissant l'importance de ce droit, la Commission de réforme du droit, dans son document de travail intitulé *Les poursuites pénales: responsabilité politique ou judiciaire*, préconisait le maintien du droit du citoyen de déposer une accusation[262].

223. Toutefois, une fois établie la justification d'un pouvoir de nature coercitive, la responsabilité de l'exercice de ce pouvoir doit, dans la mesure du possible, revenir aux représentants de l'État. D'un certain point de vue, ce principe découle de l'idée fondamentale de «pacte», laquelle est au cœur même du régime libéral et démocratique: le citoyen renonce à ses pouvoirs coercitifs en faveur de l'État qui lui offre en retour sa protection[263]. Par ailleurs, suivant le common law, la personne qui exécute le mandat ne doit avoir aucun intérêt matériel dans l'issue de la perquisition[264].

224. S'il semble préférable que la responsabilité de l'exécution du mandat de perquisition ne soit pas confiée au particulier, cela n'empêche pas que celui-ci puisse prêter son concours à l'agent de la paix si ce dernier le juge nécessaire pour l'exécution du mandat. En

effet, il va sans dire que dans certains cas, la présence du plaignant ou d'une autre personne peut à la fois faciliter la perquisition et réduire le caractère attentatoire de celle-ci. Par exemple, dans le cas de perquisitions et de saisies visant des documents commerciaux, un comptable est beaucoup plus à même de déterminer quels sont les documents pertinents. Certaines forces de police s'assurent la collaboration d'un particulier en demandant que le mandat soit adressé aussi bien à celui-ci qu'aux agents de la paix. Cependant, il n'est pas sûr qu'une telle pratique soit légale, eu égard au libellé du paragraphe 443(1), où il est prévu qu'un mandat peut être délivré à «une personne y nommée *ou* un agent de la paix». Or, la personne dont la présence n'est pas autorisée peut légalement être expulsée d'un lieu privé, voire s'exposer à des poursuites en responsabilité civile. Il importe donc de clarifier cette situation. C'est pourquoi notre recommandation prévoit expressément qu'un particulier peut accompagner un agent de la paix. En outre, la personne visée ne peut plus mettre en doute la légalité de la présence du particulier, puisque celle-ci est expressément autorisée dans le mandat.

B. L'agent de la paix compétent

RECOMMANDATION

21. Tout agent de la paix se trouvant dans le ressort de la personne qui a délivré le mandat devrait être habilité à exécuter le mandat.

225. Après avoir établi que la responsabilité de l'exécution des mandats revient aux agents de la paix, il reste à déterminer quels sont les agents de la paix compétents. Or, cette question met en lumière certaines contradictions entre les diverses dispositions relatives au mandat. Ainsi, on a jugé que le mandat délivré en vertu des dispositions de l'article 443, lesquelles permettent au juge de paix d'autoriser «un agent de la paix» à effectuer une perquisition, pouvait être adressé à tous les agents de la paix de la province[265]. D'après la jurisprudence, il semble en outre que le mandat délivré en vertu des dispositions de l'article 181 puisse validement être adressé d'une façon aussi large[266]. En revanche, les mandats prévus par les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* doivent être exécutés par «un agent de la paix y nommé». C'est pour cette raison que dans l'affaire *Goodbaum*, le tribunal a

décidé que la désignation générale permise par les dispositions de l'article 443 rendait invalide un mandat visant des stupéfiants[267].

226. Cette disparité est à la source des irrégularités qui ont été relevées dans plusieurs des 98 mandats visant des stupéfiants ou des drogues, qui ont été examinés par le comité des juges. Bien que la désignation de l'agent de la paix chargé de l'exécution du mandat puisse sembler une exigence relativement mineure, il convient de se demander pourquoi on a restreint l'exécution du mandat de cette façon. Du point de vue de la personne visée par la perquisition, la désignation de l'agent ne diminue certainement pas la gravité de l'atteinte portée à ses droits. Elle ne constitue pas non plus une attestation de l'aptitude de la personne nommée à exécuter le mandat. En fait, la désignation semble plutôt engager le détenteur, ne serait-ce qu'implicitement, à respecter les règles régissant l'exécution du mandat.

227. Par contre, il existe des arguments solides en faveur de l'abolition des restrictions légales concernant la compétence des agents de la paix. Le caractère personnel de l'autorisation remonte essentiellement à la notion archaïque suivant laquelle le pouvoir devait être transmis d'une personne à l'autre, étant donné la subordination du constable au juge de paix. De nos jours, vu la complexité de l'organisation des forces de police, cette relation de subordination n'a plus d'intérêt pratique. Elle a fait place à une hiérarchie de commandement et de délégation au sein même des forces de police. La personne chargée de délivrer le mandat devrait donc s'assurer que l'agent qui présente la demande connaît suffisamment les éléments de l'enquête pour être en mesure de présenter les motifs justifiant la délivrance du mandat. En revanche, comme cette personne ne joue aucun rôle dans l'administration de la police, rien ne lui permet de décider qui doit exécuter le mandat qu'elle a délivré.

228. Dès lors, la seule justification que l'on puisse donner à la restriction qu'impose la désignation des personnes habilitées à exécuter le mandat tient à la compétence territoriale de celui qui délivre le mandat. Cette restriction figure pour ainsi dire dans toutes les dispositions relatives au mandat en matière criminelle. Au paragraphe 443(1) du *Code*, par exemple, il est question de lieux se trouvant dans la «circonscription territoriale» du juge de paix. Par ailleurs, aux termes des paragraphes 101(9), 181(1) et 182(1), la compétence territoriale de la personne qui délivre le mandat est définie en termes de «circonscription territoriale», de «ressort» et de «juridiction», respectivement. La question de la compétence

territoriale déborde le cadre de la présente étude. C'est pourquoi nous n'entendons pas, pour le moment, remettre en question la division actuelle en circonscriptions territoriales. Pour la même raison, nous n'aborderons pas le mécanisme du «visa», actuellement prévu au paragraphe 443(2) du *Code criminel*, qui permet l'exécution d'un mandat dans une autre circonscription territoriale que celle où il a été délivré.

C. L'exécution de jour ou de nuit

RECOMMANDATION

22. Le mandat ne devrait pouvoir être exécuté que pendant le jour, à moins que celui qui en fait la demande n'en justifie l'exécution de nuit.

229. Au dix-septième siècle, le common law ne permettait l'exécution des mandats que durant le jour. Les perquisitions nocturnes étaient interdites, tant à cause des perturbations qu'elles causaient, que dans la mesure où elles pouvaient servir à masquer un vol par effraction[268]. Les moyens d'éclairage modernes ont évidemment enlevé beaucoup de poids à ce dernier argument alors que le premier conserve toute son actualité. En effet, la plupart des gens dorment la nuit, et le fait de déranger leur sommeil constitue une forme particulièrement irritante d'atteinte à la vie privée. Pourtant, de nos jours, le seul mandat en matière pénale qui porte encore la marque de cette ancienne règle du droit anglais est celui qui est prévu à l'article 443, et dont l'exécution est régie par les dispositions de l'article 444:

> Un mandat décerné en vertu de l'article 443 doit être exécuté de jour, à moins que le juge de paix, par le mandat, n'en autorise l'exécution de nuit.

Quant aux mandats prévus par les dispositions des articles 181 et 182 du *Code* ils peuvent être exécutés «de jour ou de nuit», tandis que ceux que prévoient la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*, peuvent l'être «à toute heure». Enfin, les dispositions des articles 100, 160, 281.3 et 353 ne font aucune mention des heures auxquelles les mandats dont elles traitent peuvent être exécutés.

230. En fait, les données pratiques dont nous disposons montrent qu'en ce qui a trait à l'heure, l'exécution de la plupart des

mandats est laissée à la discrétion de l'agent de la paix. Toutefois, dans certaines villes visées par notre étude, notamment à Edmonton et à Winnipeg, les juges de paix locaux, de même que les juges de la Cour provinciale, ont pris l'habitude d'imposer des restrictions concernant la période du jour pendant laquelle un mandat peut être exécuté. En fait, l'imposition de restrictions concernant le temps semble tenir beaucoup plus aux usages locaux qu'au régime de délivrance du mandat. Notre étude montre également qu'une fois imposées, les restrictions concernant les heures sont généralement observées. Parmi les cas signalés où des restrictions avaient été imposées, et où il était possible de vérifier si celles-ci avaient été respectées, la grande majorité des mandats avaient été exécutés au cours de la période prescrite[269].

231. Quelle devrait-être la règle générale? Aucun des États dont le système de droit s'inscrit dans la tradition du common law, et sur lesquels a porté notre étude, n'a conservé l'interdiction absolue des perquisitions nocturnes. À vrai dire, ce sont les dispositions du *Code de procédure pénale* français qui se rapprochent le plus de la position de Hale. Elles prévoient que «sauf réclamation faite de l'intérieur de la maison ou exceptions prévues par la loi, les perquisitions et les visites domiciliaires ne peuvent être commencées avant 6 heures et après 21 heures[270]». Par contraste, l'Australie a adopté une position très large. Aux termes du *Crimes Act*, le mandat peut permettre à l'agent de pénétrer dans un lieu à toute heure[271]. Certaines propositions de réforme présentées récemment dans ce pays donnent au magistrat le pouvoir discrétionnaire de restreindre la période d'exécution sans toutefois établir d'obligation ou de présomption relativement aux heures qui peuvent être appropriées[272]. Entre ces deux positions extrêmes se trouve la règle fédérale américaine 41(c)(1):

> [TRADUCTION]
> Le mandat doit être exécuté de jour, à moins que l'autorité qui le délivre n'autorise son exécution à un autre moment, en le mentionnant de façon appropriée sur le mandat, et sur la preuve d'un motif raisonnable. L'autorité doit en outre préciser à quel magistrat fédéral le mandat doit être rapporté.

232. La position adoptée aux États-Unis nous paraît être la plus satisfaisante. En effet, d'une part, elle tient compte du souci d'efficacité qui serait compromis si les fouilles ne pouvaient, de façon absolue, être exécutées que pendant le jour. D'autre part, elle oblige celui qui présente la demande à justifier la nécessité d'exécuter le mandat de nuit, avant de pouvoir exercer ce pouvoir dont le caractère

attentatoire est nettement plus marqué. Essentiellement, le «motif raisonnable» consiste à prouver que [TRADUCTION] «le mandat ne peut être exécuté de jour ou que les biens que l'on veut saisir seront enlevés ou détruits[273]». Nous recommandons l'adoption, au Canada, d'un critère semblable à celui qui a été formulé aux États-Unis.

D. La date limite d'exécution

RECOMMANDATION

23. Le mandat ne devrait être exécutoire que pendant huit jours. L'agent de la paix devrait toutefois être en droit de demander la délivrance d'un nouveau mandat si les motifs justifiant la perquisition existent toujours à l'expiration du terme.

233. À l'heure actuelle, aucune disposition législative n'exige que les perquisitions avec mandat soient exécutées dans un délai déterminé. Toutefois, dans l'affaire *Execu-Clean Ltd.*, la Haute cour de l'Ontario a laissé entendre que si un délai était spécifié dans le mandat, l'agent de la paix avait l'obligation de le respecter[274]. Pourtant, il est difficile de savoir en vertu de quelle autorité la personne qui délivre le mandat peut imposer une telle restriction. Malgré cette incertitude, on constate, dans certaines régions, une tendance à spécifier un délai pour l'exécution du mandat. En tout, 18,2 pour cent des mandats exécutés qui ont été soumis à notre étude comportaient une date d'expiration[275]. La pratique locale semble encore une fois être le facteur déterminant. Par exemple, la fixation d'un délai d'exécution semble beaucoup plus fréquente à Edmonton et à Toronto qu'à Winnipeg, à Vancouver ou à Montréal. En outre, les résultats de notre enquête montrent que les mandats comportant une date d'expiration étaient exécutés plus rapidement que les autres.

234. Nous sommes d'avis que la fixation d'un délai pour l'exécution du mandat de perquisition est une règle dont l'adoption est fort souhaitable, dans la mesure où elle se justifie tant au regard de la spécificité du mandat, que par rapport au caractère judiciaire de celui-ci. Dans l'arrêt *Regina* v. *Adams*, la Cour d'appel de l'Angleterre a décidé qu'un mandat de perquisition visant des publications obscènes ne permettait d'entrer qu'une seule fois dans un lieu afin d'y procéder à une perquisition et à une saisie. La Cour a jugé que cette conclusion s'imposait si l'on tenait pour acquis que le

mandat devait être «spécifique»[276]. Cependant, donner à la police le loisir d'exécuter le mandat beaucoup plus tard emporte la possibilité qu'elle le fasse dans des circonstances différentes de celles qui ont donné lieu à la délivrance du mandat. Or, c'est l'atteinte aux droits de la personne qui doit être justifiée par les circonstances, et non seulement l'attribution du pouvoir de perquisition. Il est donc nécessaire que l'exécution du mandat suive la délivrance de près. Par exemple, on ne saurait admettre qu'un mandat soit exécuté cent trois jours après sa délivrance, comme cela s'est produit dans un cas relevé par la Commission[277].

235. Nombreux sont les pays qui ont imposé des délais obligatoires pour l'exécution des perquisitions. Au Canada, même si le droit fédéral ne comporte aucune disposition de cette nature, plusieurs lois provinciales, notamment celles qui ont trait à la surveillance du commerce de l'alcool, énoncent que l'exécution doit avoir lieu dans un certain délai[278]. L'étendue de ce délai peut toutefois varier considérablement. La Commission royale britannique sur la procédure pénale et la Commission de réforme du droit australienne ont toutes deux proposé un délai de sept jours[279], délai qui nous paraît raisonnable[280]. Toutefois, eu égard à l'implantation graduelle de la semaine de quatre jours au sein des forces de police, nous recommandons que le délai soit fixé à huit jours. Lors de consultations effectuées par des recherchistes de la Commission, les autorités policières ont laissé entendre qu'un tel délai ne nuirait pas à leurs opérations. À l'expiration du délai, si la police croit que les circonstances justifient toujours l'autorisation d'une perquisition, il n'est pas déraisonnable d'exiger qu'elle présente une nouvelle demande faisant état de ces circonstances, et obtienne un nouveau mandat.

E. La portée des fouilles, des perquisitions et des saisies avec mandat

RECOMMANDATION

24. L'agent de la paix exécutant un mandat de perquisition ne devrait être habilité à fouiller, dans les lieux ou les véhicules spécifiés dans le mandat, ou sur les personnes nommées dans le mandat, que les endroits où il est raisonnable de croire que les objets spécifiés dans le mandat sont susceptibles de se trouver. Outre les choses «saisissables»

spécifiées dans le mandat, l'agent de la paix exécutant une telle fouille ou perquisition devrait être habilité à saisir toute autre chose «saisissable» se trouvant bien en vue.

236. Comme nous l'avons vu précédemment, les choses suivantes peuvent légitimement faire l'objet d'une perquisition et d'une saisie: les produits d'une infraction, les choses qui constituent la preuve d'une infraction, de même que les choses, les fonds et les renseignements dont la possession, dans les circonstances de l'espèce, constitue une infraction. Dans une affaire donnée, le mandat délivré doit donc comporter la description de choses faisant partie de l'une ou l'autre de ces catégories. Toutefois, l'agent peut découvrir, au cours de la perquisition autorisée, d'autres choses, fonds ou renseignements visés par la définition du terme «choses saisissables», mais non spécifiés dans le mandat. L'agent doit-il être habilité à les saisir?

237. En ce qui a trait au mandat délivré en vertu des dispositions de l'article 443, on peut répondre par l'affirmative, mais avec quelques réserves. Les dispositions de l'article 445 du *Code* autorisent clairement la saisie de choses non mentionnées dans le mandat, lorsqu'il existe des motifs raisonnables de croire qu'elles ont été «obtenues au moyen d'une infraction ou ont été employées pour la perpétration d'une infraction». Même si elles ne permettent pas expressément la saisie d'objets n'ayant qu'une valeur probante, ces dispositions confèrent à l'agent de la paix un pouvoir considérable. C'est pour cette raison que dans les manuels de formation des policiers, on recommande aux agents de ne pas se limiter à rechercher les objets spécifiés dans le mandat. [TRADUCTION] «Soyez attentif à toute chose pouvant être liée à la perpétration d'une infraction», peut-on lire dans le "Metropolitan Toronto Training Précis"[281].

238. D'après les résultats de l'enquête menée par la Commission, le pouvoir de saisir des objets non mentionnés dans le mandat est utilisé souvent, mais non dans la majorité des cas. Si l'on ventile ces résultats d'après les objets saisis, 66,3 pour cent des saisies signalées visaient des choses ou des types de choses décrits dans le mandat[282]. Les autres saisies, c'est-à-dire 33,7 pour cent du nombre total, correspondaient aux cas où l'on a saisi des biens dont la personne qui a délivré le mandat n'avait pas, d'après la preuve qui lui avait été présentée, ordonné la saisie. Comment peut-on alors justifier de telles dérogations aux prescriptions du mandat?

239. Si l'agent a vraiment des motifs raisonnables de saisir les autres biens, il pourrait, cela va sans dire, obtenir un mandat à leur égard. Passer outre à cette exigence revient essentiellement à lui permettre d'exécuter une saisie sans mandat. Néanmoins, la jurisprudence a reconnu la validité de telles saisies pour un motif que nous avons nous-mêmes repris dans le présent document, comme justifiant une exception à l'exigence du mandat: l'obtention d'un mandat serait impraticable. Dans l'affaire *Chic Fashions (West Wales) Ltd.* v. *Jones*, Lord Denning a décrit ce cas en des termes on ne peut plus clairs:

> [TRADUCTION]
> Supposons que l'agent de police ne trouve pas les biens mentionnés dans le mandat mais en trouve d'autres qu'il croit, pour des motifs raisonnables, avoir été volés. Doit-il quitter les lieux, retourner chez le magistrat et lui demander un nouveau mandat de perquisition? S'il agissait ainsi, je crois bien que dans neuf cas sur dix, ces autres biens auraient disparu avant son retour. Leur véritable propriétaire ne pourrait plus les récupérer et la preuve du crime serait perdue. Une telle pratique équivaudrait à faciliter la tâche des voleurs et à décourager les honnêtes gens[283].

240. Sans doute s'agit-il là d'une analyse un peu trop pessimiste. En effet, même dans le cadre du système traditionnel, l'agent de la paix pourrait toujours, par exemple, demander à l'un de ses collègues de rester sur les lieux pendant qu'il obtient l'autorisation d'un juge de paix. Par ailleurs, le mécanisme du télémandat lui permettrait d'obtenir le mandat sans avoir à quitter les lieux. En revanche, des cas pourraient certainement se présenter où l'obtention d'un mandat par téléphone ne serait pas une solution. Par exemple, il pourrait ne pas y avoir de téléphone sur les lieux. En outre, la sécurité de l'agent peut être en danger et la personne soumise à la perquisition peut tenter de détruire les objets, malgré la présence de l'agent. Somme toute, il s'agit de déterminer si les inconvénients que comporte l'obtention d'un second mandat sont trop importants par rapport aux dangers que représente la saisie de biens non spécifiés dans le mandat.

241. Le fait de permettre la saisie d'objets non désignés dans le mandat présente deux risques importants. En premier lieu, il est possible que ces objets soient saisis par suite de pures conjectures ou de l'exercice arbitraire d'un pouvoir discrétionnaire, plutôt que d'après l'existence de motifs raisonnables de croire que ces objets sont légalement saisissables. Or, l'arbitraire est bien entendu le danger que le concept du contrôle préalable, aspect essentiel du

mandat, cherche à conjurer. Toutefois, l'existence d'un mandat de perquisition indique que, du moins en ce qui a trait à l'entrée et à la perquisition, le contrôle nécessaire a déjà été exercé. Nous estimons qu'il suffirait, pour que la saisie de biens non spécifiés dans le mandat soit contrôlée de façon appropriée, d'exiger qu'après la saisie, l'agent de la paix fasse un rapport dans lequel il exposerait les détails de la saisie, de même que les raisons pour lesquelles elle a été faite. Cette façon de procéder est prévue à la recommandation 37, sur laquelle nous reviendrons plus loin dans ce chapitre[284]. Si elle ne peut empêcher les saisies injustifiées, cette règle pourrait à tout le moins en diminuer la fréquence, dans la mesure où l'agent de la paix saurait qu'il devra éventuellement répondre de ses actes. En outre, comme dans le cas de la demande écrite, elle donne à la personne visée les moyens de contester la saisie si elle s'estime lésée. Par ailleurs, l'obligation de rédiger un rapport n'a rien d'insurmontable. Elle ne fait qu'ajouter un élément au rapport que l'agent doit présenter à la personne qui a délivré le mandat.

242. En second lieu, le fait de permettre la saisie d'objets qui ne sont pas spécifiés dans le mandat pourrait, comme l'écrivait le juge Stewart de la Cour suprême des États-Unis [TRADUCTION] «inciter un fonctionnaire à profiter d'un mandat qui paraît précis et conforme à la loi pour pénétrer dans la demeure de quelqu'un» et, une fois introduit, «perquisitionner sans retenue» en vue de trouver des objets saisissables[285]. C'est pourquoi la jurisprudence américaine a élaboré la doctrine des «objets bien en vue», laquelle interdit à l'agent de la paix de fureter dans tous les coins de la demeure de la personne. Nous en concluons que la saisie d'objets non spécifiés dans le mandat devrait être limitée par cette doctrine des «objets bien en vue». Puisque, à strictement parler, cette règle trouve application en dehors du cadre de l'exécution du mandat, nous en reparlerons plus loin dans ce chapitre[286]. Pour le moment, nous nous contenterons d'énoncer, à la recommandation 24, une modeste proposition suivant laquelle l'exécution de la perquisition doit être limitée par les motifs qui la justifient.

III. L'exécution des fouilles et des perquisitions en général

243. Les règles qui suivent traitent des problèmes liés aussi bien aux fouilles et aux perquisitions sans mandat qu'à celles qui sont effectuées en vertu d'un mandat. Bien que les données précises de

ces problèmes puissent varier, du cas type de perquisition avec mandat au cas type de perquisition sans mandat, nous estimons que les principes régissant la solution de ces problèmes devraient être uniformes.

A. L'emploi de la force

RECOMMANDATION

25. L'emploi de la force devrait continuer d'être régi de façon générale par les critères actuellement énoncés au paragraphe 25(1) du *Code criminel*, aux termes duquel l'agent de la paix qui agit en s'appuyant sur des motifs raisonnables et probables est fondé à employer la force nécessaire.

244. L'emploi de la force est l'un des éléments circonstanciels de la perquisition qui peut difficilement être prévu par le mandat et cela, pour plusieurs raisons. D'une part, il s'agit d'un facteur trop aléatoire: le degré de force qu'un agent peut être autorisé à utiliser dépend de circonstances qui peuvent varier d'un moment à l'autre. D'autre part, il s'agit d'un facteur trop général: il est présent dans tous les domaines de l'application de la loi, et non seulement à l'égard des perquisitions et des saisies. En outre, il s'agit d'un domaine où c'est peut-être l'application des règles, plutôt que les règles elles-mêmes, qui pose des difficultés[287].

245. À l'heure actuelle, le paragraphe 25(1) du *Code criminel* énonce la règle générale concernant l'emploi de la force:

> Quiconque est, par la loi, obligé ou autorisé à faire quoi que ce soit dans l'application ou l'exécution de la loi
>
> ...
>
> *b*) à titre d'agent de la paix ou de fonctionnaire public,
>
> ...
>
> est, s'il agit en s'appuyant sur des motifs raisonnables et probables, fondé à accomplir ce qui lui est enjoint ou permis de faire et fondé à employer la force nécessaire pour cette fin.

Ces dispositions s'appliquent aussi bien aux fouilles de personnes qu'aux perquisitions. Nous discuterons plus loin dans ce chapitre des fouilles personnelles[288]. Néanmoins, la force peut également être em-

ployée contre une personne au cours d'une perquisition. Par exemple, celle-ci peut tenter d'empêcher l'agent de la paix de fouiller sa demeure. Comme le critère utilisé pour déterminer le bien-fondé de l'emploi de la force contre les personnes est le même, qu'il s'agisse d'une perquisition ou d'une fouille personnelle, il nous est donc possible d'aborder dès maintenant cette question d'une façon globale.

246. Il est un contexte particulier où l'emploi de la force lors d'une perquisition n'est pas régi par les dispositions de l'article 25. En effet, certains pouvoirs spéciaux sont prévus par les dispositions du paragraphe 10(4) de la *Loi sur les stupéfiants*, et celles du paragraphe 37(4) de la *Loi des aliments et drogues*, dont voici la teneur:

> Aux fins d'exercer son autorité en vertu du présent article, un agent de la paix peut, avec l'assistance qu'il estime nécessaire, forcer toute porte, fenêtre, serrure, targette, enfoncer tout parquet, mur, plafond, compartiment, ou briser toute tuyauterie, boîte, tout contenant ou toute autre chose.

On pourrait difficilement justifier qu'un pouvoir discrétionnaire aussi étendu puisse être érigé en règle générale. Au chapitre neuf, nous nous interrogerons sur le bien-fondé des pouvoirs exorbitants prévus par ces deux lois[289].

247. Au Canada, l'arrêt *Levitz* v. *Ryan* fait autorité en ce qui concerne le problème de l'emploi de la force au cours d'une perquisition. En l'occurrence, il s'agissait d'une perquisition effectuée en vertu d'un mandat de main-forte. Toutefois, le juge Arnup, de la Cour d'appel de l'Ontario, a analysé la question d'une façon générale, prenant en considération la jurisprudence américaine sur les mandats de perquisition. Il a conclu qu'une «surveillance raisonnable» des personnes se trouvant sur les lieux pouvait, selon les circonstances de l'affaire, s'avérer nécessaire lors d'une perquisition[290]. En l'espèce, au moment où le plaignant avait tenté de s'enfuir, l'agent s'était saisi de lui, l'avait projeté en arrière et l'avait fait tomber. La Cour a jugé que le degré de force employée était raisonnable.

248. Le critère prévu au paragraphe 25(1) ne s'applique pas seulement au degré de force employée, mais aussi à la décision même de recourir à la force. Dans les manuels de formation de l'"Ontario Police College", on reconnaît que [TRADUCTION] «le policier ne devrait recourir à la force physique que lorsque la persuasion, les avis et les mises en garde ne lui permettent pas de s'acquitter de sa tâche[291]». Certes, la fouille d'une personne comporte toujours l'emploi d'un certain degré de force, surtout en matière de stupéfiants et de drogues. Les parties du corps où, suivant les manuels de formation, de telles

fouilles peuvent avoir lieu, comprennent notamment les membres artificiels, les fesses, le prépuce, le nez, le rectum, le vagin et ce qui se trouve sous les prothèses dentaires et les pansements[292]. De telles fouilles sont souvent douloureuses et constituent des atteintes particulièrement graves à la personne. C'est pourquoi nous recommandons qu'elles soient régies par des règles particulières[293], que l'on trouvera dans les recommandations 32 et 33.

249. Dans la plupart des cas, cependant, les critères les plus satisfaisants sont encore ceux qui sont énoncés à l'article 25 du *Code criminel*. Même dans le *Code de l'A.L.I.*, malgré tous les détails qu'il contient, il n'est question, en matière de perquisition, que du caractère «raisonnable» et «nécessaire». On y trouve en outre certaines dispositions semblables à celles du paragraphe 25(3) du *Code* canadien, concernant la force de nature à causer la mort. Bien que l'idée de décrire de façon plus détaillée dans la loi le mode d'application de ces critères soit alléchante, il serait vain de viser à l'exhaustivité. En effet, les circonstances qui peuvent inciter l'agent à employer la force peuvent varier à l'infini, de sorte qu'elles échappent à tout espoir de codification. Il semble plus sage de prévoir dans la loi un critère général, et de laisser à la formation des policiers et à la jurisprudence le soin de formuler des principes directeurs.

B. L'entrée sans préavis

RECOMMANDATION

26. En l'absence de circonstances justifiant l'entrée sans préavis ou par la force dans un lieu privé, l'agent de la paix devrait être tenu de demander la permission avant d'entrer. Si l'occupant n'obtempère pas dans un délai raisonnable, l'agent devrait alors avoir le pouvoir d'employer la force.

250. Un ensemble de règles particulières se sont fait jour relativement à l'entrée sans préavis ou par la force. Elles remontent au *Semayne's Case* qui date du dix-septième siècle:

[TRADUCTION]
Dans tous les cas où le Roi est partie à un litige, le shérif peut (si les portes ne sont pas ouvertes) entrer par la force dans la demeure d'une personne, soit pour l'arrêter, soit pour exécuter autrement l'ordonnance du Roi, s'il lui est impossible d'entrer d'une autre façon. Mais avant d'entrer par la force, il doit donner les raisons de sa venue et demander qu'on lui ouvre les portes[294].

On aura remarqué que cette règle concerne la «demeure» d'une personne, à l'exclusion de tout autre lieu. Cette distinction a été reprise par la jurisprudence canadienne dans l'affaire *Wah Kie* v. *Cuddy*[295]. Confirmant qu'en règle générale, l'agent de la paix devait demander l'ouverture des portes avant de pénétrer dans une maison d'habitation, cette décision est venue préciser que cette règle ne s'appliquait pas lorsqu'il ne s'agissait pas d'une résidence, auquel cas l'agent n'était lié que par le critère du «caractère raisonnable et nécessaire» de l'acte. L'essence de ce critère a été intégrée aux dispositions du paragraphe 182(2), qui permettent l'emploi de la force pour pénétrer dans un endroit, et qui s'appliquent au mandat visant à obtenir des preuves en matière de jeu et de débauche, et à arrêter des femmes se trouvant dans une maison de débauche.

251. Dans ce domaine, il y aurait peut-être lieu d'accorder moins d'importance à la distinction entre les maisons d'habitation et les autres lieux, et de prendre en considération les facteurs circonstanciels. Dans l'affaire *Eccles* c. *Bourque*, où les policiers étaient entrés en vue d'effectuer une arrestation, le juge Dickson a décrit quelques-unes des circonstances pouvant justifier l'entrée sans préavis ou par la force. Il s'agit notamment de la nécessité de sauver une personne en danger de mort ou de blessures, de la nécessité d'empêcher la destruction d'éléments de preuve, ainsi que de la chasse à l'homme[296]. On retrouve d'autres énumérations dans la jurisprudence américaine portant sur la règle de l'entrée sans avertissement. Elles incluent les cas prévisibles de violence, d'évasion, de destruction d'éléments de preuve, d'activités illégales manifestes ou tout simplement de portes déjà ouvertes[297]. Tout compte fait, nous sommes d'avis que, quelle que soit la destination des lieux privés, en l'absence de circonstances justifiant l'entrée sans préavis ou par la force, l'agent devrait avoir l'obligation de demander qu'on lui ouvre la porte. Si la demande reste infructueuse, l'agent devrait alors être en droit, afin de pénétrer dans les lieux, d'avoir recours à la force dans une mesure raisonnable, si besoin est. Suivant la jurisprudence américaine, l'agent doit, après avoir donné l'avis, attendre un délai raisonnable avant de forcer la porte. On a jugé qu'un délai de trente secondes était raisonnable[298]. Un critère semblable devrait être adopté en droit canadien.

C. Les obligations envers la personne visée par la fouille, la perquisition ou la saisie

RECOMMANDATIONS

27. Lorsqu'un agent de la paix effectue une fouille, une perquisition ou une saisie en vertu d'un mandat, il devrait être tenu, avant d'entreprendre la fouille ou la perquisition, ou dès que possible par la suite, de remettre une copie du mandat à la personne visée ou à une autre personne présente qui a manifestement la responsabilité du lieu ou du véhicule devant être fouillé. Si le lieu ou le véhicule est inoccupé lors de la perquisition ou de la saisie, une copie du mandat devrait y être affichée de façon convenable.

28. Lorsque cela est possible, une personne présente qui a manifestement la responsabilité du lieu ou du véhicule fouillé devrait être autorisée à assister à la fouille.

29. Si des choses sont saisies au cours d'une perquisition, la personne visée devrait être en droit de recevoir, sur demande, une copie du procès-verbal de saisie. Si, à la connaissance de l'agent, les choses saisies appartiennent à une autre personne que celle qui est fouillée ou qui est propriétaire du lieu ou du véhicule fouillé, une copie du procès-verbal devrait également être fournie au propriétaire, sans que celui-ci soit tenu de la demander. Le procès-verbal devrait contenir tous les détails qui peuvent raisonnablement être donnés dans les circonstances.

(1) *La production du mandat*

252. À l'heure actuelle, l'obligation qu'a l'agent de la paix de donner des renseignements à l'occupant au sujet de la perquisition est assez réduite. Elle se résume à présenter le mandat, à la demande de la personne visée, dans la mesure où il est requis de le faire en vertu des dispositions du paragraphe 29(1) du *Code criminel*:

> Quiconque exécute un acte judiciaire ou un mandat est tenu de l'avoir sur soi, si la chose est possible, et de le produire lorsque demande lui en est faite.

Même si les dispositions du paragraphe 29(1) du *Code* constituent un effort louable en vue de protéger les personnes visées par l'exécution d'un mandat contre les fouilles et les perquisitions non autorisées,

elles présentent deux lacunes importantes. En premier lieu, l'agent n'est tenu de présenter le mandat que s'il l'a en sa possession, «si la chose est possible», et encore, seulement si la personne visée lui en fait la demande. En second lieu, rien dans les dispositions du paragraphe 29(1) n'exige que le mandat soit présenté au début de la perquisition, c'est-à-dire au moment où la preuve du bien-fondé de la perquisition est sans doute la plus importante. Signalons à ce propos que la jurisprudence canadienne n'a jamais exigé que le mandat soit produit au début de la perquisition ou dès que possible par la suite[299].

253. Lors des entretiens qu'ils ont eus avec les recherchistes de la Commission, les membres d'un certain nombre de forces policières ont fait état de leurs différentes façons de procéder relativement à la production du mandat lors de la perquisition. Certains agents de la paix ont déclaré qu'ils avaient l'habitude de dire à la personne visée qu'ils détenaient un mandat, sans toutefois le présenter à moins d'en être requis. D'autres semblaient dire qu'ils produisent parfois le mandat de leur propre initiative, selon la personne à laquelle ils ont affaire. Enfin, certains ont déclaré que, de façon générale, ils permettaient à la personne visée d'examiner une copie du mandat, mais non de la garder.

254. En revanche, le *Code de l'A.L.I.* reconnaît qu'en principe, le mandat devrait être produit dès que possible, qu'une demande à cet effet ait été faite ou non:

> [TRADUCTION]
> Lors d'une fouille, d'une perquisition ou d'une saisie effectuée en vertu d'un mandat, l'agent doit faire lecture du mandat et en remettre une copie à la personne qui doit être fouillée ou à celle qui paraît avoir la responsabilité des lieux. La lecture du mandat et la remise d'une copie de celui-ci doivent avoir lieu avant le début de la fouille, de la perquisition ou de la saisie, à moins que l'agent n'ait des motifs raisonnables de croire que cette façon de procéder risque de compromettre le succès de l'exécution du mandat, ou d'être dangereuse. Le cas échéant, la lecture du mandat et la remise d'une copie de celui-ci doivent avoir lieu dès que possible. S'il ne se trouve aucune personne ayant manifestement la responsabilité des lieux, l'agent doit afficher une copie du mandat de façon convenable[300].

Cette règle peut paraître quelque peu gênante pour l'agent de la paix. Elle n'en est pas moins avantageuse, en fin de compte, pour les deux parties, dans la mesure où elle contribue à affirmer d'emblée l'autorité de l'agent.

(2) *La divulgation des motifs de la fouille ou de la perquisition*

255. La production du mandat par l'agent de la paix fournit à la personne visée des renseignements importants. Même si la plupart des mandats n'énoncent pas les motifs invoqués dans la demande[301], ils doivent tout de même spécifier les lieux qui doivent être fouillés, les objets qui doivent être saisis, de même que l'infraction à laquelle est liée la perquisition. À ces mesures de protection se joignent certains droits d'accès à l'information qui trouvent leur application après l'exécution de la perquisition[302]. En conséquence, nous ne croyons pas qu'il soit nécessaire d'y ajouter quoi que ce soit.

256. Cela étant dit, il en va tout autrement des personnes soumises à des fouilles ou à des perquisitions sans mandat puisqu'elles ne peuvent bénéficier de ces garanties. La chose est d'autant plus singulière eu égard à certaines dispositions de la *Charte canadienne des droits et libertés*. En premier lieu, les dispositions de l'article 8 protègent le citoyen contre «les fouilles, les perquisitions ou les saisies abusives». Ce serait donc donner son plein effet à cette règle constitutionnelle que d'imposer à l'agent de la paix l'obligation de donner les renseignements appropriés à la personne soumise à une fouille ou à une perquisition sans mandat. Dans cette même ligne de pensée, la Commission royale britannique sur la procédure pénale en est venue à la conclusion que dans le contexte des fouilles ou des perquisitions sans arrestation préalable ("stop and search powers"), le fait de donner les motifs de l'acte contribuerait à assurer l'application du critère des [TRADUCTION] «soupçons raisonnables[303]». En outre, le fait d'obliger les policiers à donner les motifs de la fouille, de la perquisition ou de la saisie rendrait ceux-ci responsables de leurs actes en cas de contestation. Enfin, cette exigence favoriserait l'établissement de meilleures relations entre les policiers et les personnes qu'ils doivent fouiller sans mandat dans l'exercice de leurs fonctions. Autrement dit, cela aurait pour effet de mettre en évidence le caractère raisonnable des fouilles ou des perquisitions.

257. En second lieu, la divulgation des motifs de la fouille ou de la perquisition est conforme à l'esprit des dispositions du paragraphe 10(1) de la *Charte*, dont voici la teneur:

> Chacun a le droit, en cas d'arrestation ou de détention:
>
> *a*) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
>
> *b*) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Même si cette règle constitutionnelle s'inscrit dans le contexte de l'arrestation, elle peut trouver application en matière de fouilles, de perquisitions et de saisies, dans la mesure où l'exercice de ces pouvoirs implique la détention de la personne qui y est soumise. Il s'agit notamment du cas où le policier force un conducteur à immobiliser son véhicule, ou fouille une personne conformément à la recommandation 9, et même du cas où les policiers ordonnent à toutes les personnes se trouvant dans un lieu de rester immobiles, comme dans l'affaire *Levitz* v. *Ryan*[304]. Autrement dit, il peut y avoir eu arrestation ou détention alors que l'agent de la paix exerçait un pouvoir tout à fait étranger à celui de l'arrestation (ou même n'exerçait aucun pouvoir reconnu). Pourtant, sur le plan constitutionnel, force nous est de reconnaître qu'il existe une distinction entre le pouvoir d'arrestation et les pouvoirs de fouille, de perquisition et de saisie, les mécanismes de protection relatifs à chacun d'eux étant prévus respectivement par les dispositions de l'article 10 et de l'article 8[305].

258. Si tant est que les dispositions de l'article 10 de la *Charte* soient jugées inapplicables aux cas d'exercice du pouvoir de fouille ou de perquisition, la divulgation des motifs lors de la fouille ou de la perquisition aurait tout de même l'avantage d'éliminer les palabres inutiles. En effet, d'aucuns soutiennent que d'un point de vue théorique, il existe une grande similitude entre la fouille personnelle et l'arrestation. Par conséquent, le fait d'accorder une protection différente à la personne suivant la nature du pouvoir exercé reviendrait à ouvrir la porte à des tergiversations interminables sur la nature du pouvoir effectivement exercé. Dans l'affaire *Scott*, par exemple, la Cour d'appel fédérale s'est vue dans l'obligation d'infirmer la décision du tribunal de première instance sur la question de savoir si un bref entretien entre les agents de la paix et le client d'un bar constituait une arrestation ou seulement une fouille[306]. De telles controverses pourraient être évitées si ces deux types de pouvoirs comportaient des garanties analogues sur le plan de la procédure.

259. Malgré le poids de ces arguments, nous ne pouvons souscrire à la position adoptée par la Commission royale britannique sur la procédure pénale, qui a recommandé que les motifs soient donnés aux personnes fouillées sans mandat, et que ces motifs soient consignés dans le carnet de l'agent[307].

260. Notre décision repose sur plusieurs arguments. Le premier, qui est sans doute le moins important, est celui de la paperasse qu'entraînerait une telle exigence. En effet, si l'on adoptait une telle recommandation, toute fouille de consentement obligerait l'agent de police à remplir trois formules distinctes: une déclaration des motifs justifiant la fouille, lesquels seraient sans doute notés dans le carnet du policier, une formule de consentement signée par la personne fouillée, de même qu'un procès-verbal de saisie. Or, de ces trois formules, l'exposé écrit des motifs semble celle dont on puisse se passer le plus facilement, d'autant plus que même dans le cas d'une fouille ou d'une perquisition avec mandat, celui-ci n'énonce généralement pas les motifs de la fouille. Deuxièmement, la recommandation de la Commission royale britannique s'inscrit dans le contexte particulier du pouvoir de fouille sans arrestation préalable ("stop and frisk"). Au contraire, l'ensemble de nos recommandations reflètent la prééminence que nous donnons aux fouilles et aux perquisitions avec mandat, et visent à limiter l'exercice du pouvoir de fouille et de perquisition sans mandat aux cas de nécessité reconnus et de consentement donné en connaissance de cause. Dans le cas de la fouille ou de la perquisition de consentement, l'agent de la paix doit, cela va de soi, exposer ses motifs s'il veut obtenir le consentement de la personne. Par ailleurs, nous ne reconnaissons que deux cas de nécessité: l'arrestation et le danger pour la vie humaine ou la sécurité. Pour ce qui est de la fouille ou de la perquisition concomitante de l'arrestation, aux termes de l'article 10 de la *Charte*, la personne doit être informée sans délai des motifs de son arrestation ou de sa détention. Il serait manifestement superflu d'exiger la divulgation de motifs additionnels, et par écrit, de surcroît, relativement à la fouille ou à la perquisition qui suit l'arrestation. Quant à la situation qui représente un danger pour la vie humaine ou la sécurité, il semble raisonnable de penser que ces motifs, lorsqu'ils ne sont pas évidents, se feront jour naturellement pendant ou immédiatement après l'acte.

(3) *Les témoins et le procès-verbal*

261. Outre la présentation du mandat sur demande, la loi n'exige aucun acte particulier de la part de l'agent de la paix lors d'une fouille ou d'une perquisition. Son pouvoir n'est limité que par le critère du «caractère raisonnable». Toutefois, l'application de ce critère ne tient pas compte des mesures concrètes qui doivent censément être prises en vue de protéger les droits de la personne

visée. Dans la plupart des cas, celle-ci devrait plus précisément être en droit d'assister à la perquisition et d'obtenir sur demande une copie du procès-verbal de saisie.

262. Ces préoccupations visent, dans la mesure du possible, à faire de la perquisition un acte ostensible et empreint de respect et de politesse, ainsi qu'à encourager la conscience professionnelle chez les policiers. Même si les intérêts de l'agent de la paix et de l'occupant sont forcément antagoniques, il n'est pas nécessaire que l'exécution de la perquisition soit caractérisée par l'hostilité mutuelle. Au contraire, l'agent de la paix devrait être conscient du caractère attentatoire de son acte et, dans la mesure du possible, faire preuve de respect à l'endroit de l'occupant. Bien que dans les manuels de formation des policiers au Canada, ainsi que dans le *Code de A.L.I.*, on insiste clairement sur la courtoisie, cette politique a été élevée à un degré de raffinement remarquable dans le *Code de procédure pénale* français. On y trouve des règles différentes selon que le propriétaire du domicile fouillé a été mis en accusation ou non. Dans les deux cas cependant, la perquisition doit être effectuée en présence de l'occupant ou d'un représentant de celui-ci. Si l'occupant n'est pas accusé, il est «invité à ... assister» à la perquisition. Une fois la perquisition terminée, on dresse un procès-verbal qui doit être signé par les personnes ayant assisté à la perquisition[308]. Certes, on doit tenir compte des différences qui existent entre les systèmes de droit civil et de common law. Toutefois, la position adoptée dans la loi française semble vouloir s'imposer.

263. La règle générale voulant que l'occupant d'un lieu ou d'un véhicule fouillé soit en droit d'assister à la perquisition ne se justifie pas seulement par rapport à la courtoisie, mais aussi par rapport au simple bon sens: la présence d'un témoin peut servir à corroborer le compte-rendu de l'agent à l'égard de la perquisition. Dans une certaine mesure, cette politique a déjà été sanctionnée par les lignes de conduite des policiers, lesquelles exigent que le policier demande au propriétaire ou à l'occupant des lieux de l'accompagner lors de la perquisition[309]. Bien sûr, le fait de permettre à un voisin ou à un passant d'assister à la perquisition en l'absence de la personne directement concernée peut constituer une atteinte à la vie privée de celle-ci. Il n'en reste pas moins qu'à l'égard des occupants eux-mêmes, la loi devrait sanctionner les règles de conduite actuelles en les intégrant aux dispositions législatives régissant l'exécution des perquisitions. Ces dispositions devraient toutefois prévoir les cas où la présence de la personne serait nuisible à l'exécution de la perquisition (par exemple, lorsque l'hostilité de la personne est

susceptible de faire avorter la perquisition). Dans les cas où le lieu ou le véhicule fouillé est inoccupé, à défaut de témoins, nous proposons que l'agent de la paix qui exécute la perquisition soit tenu d'afficher convenablement une copie du mandat.

264. Le common law a toujours reconnu le bien-fondé de l'exigence du procès-verbal dans le cas de saisie de biens volés[310]. Pourtant, on ne retrouve cette exigence dans aucune disposition législative moderne. Toutefois, un certain nombre de forces policières canadiennes obligent leurs membres à dresser des procès-verbaux. Notamment, les membres de l'une de ces forces ont fait savoir aux recherchistes de la Commission qu'ils faisaient parvenir un relevé de pièces à conviction à la personne dont les biens avaient été saisis, de même qu'à leur propre service des dossiers. En revanche, une autre force policière s'est montrée défavorable aux mécanismes des procès-verbaux, dans la mesure où ils constituent une source de paperasse inutile. Pour étayer sa position, elle a fait état de l'absence de plaintes provenant des personnes visées. Entre ces deux positions extrêmes se trouve celle d'un certain nombre de forces policières dont les membres ont affirmé qu'ils envoyaient une copie du procès-verbal, à la demande de la personne visée.

265. On retrouve dans les règles fédérales américaines[311] une disposition législative exigeant qu'un procès-verbal soit envoyé à la personne dont les biens ont été saisis. L'adoption d'une telle disposition a été recommandée par la Commission royale britannique sur la procédure pénale[312]. Nous sommes d'avis que ce principe devrait aussi être repris au Canada, mais avec une réserve. En effet, il peut arriver que la personne saisie n'ait pas besoin d'un procès-verbal, et même qu'elle ne veuille pas en obtenir. Il s'agit notamment du cas où la possession des biens saisis est illégale. C'est pourquoi nous proposons que cette exigence s'applique à la demande du saisi. Étant donné qu'un procès-verbal doit de toute façon être dressé par l'agent de la paix, en vue du rapport qui doit être fait au juge de paix, sans parler du procès-verbal qui est habituellement dressé à des fins administratives, cette règle n'a rien pour alourdir la tâche des policiers. Au demeurant, la nécessité pour l'occupant de savoir lesquels de ses biens ont été saisis doit l'emporter sur les inconvénients que cette règle comporte, quels qu'ils soient. En outre, celle-ci renforce le caractère ostensible des mécanismes de fouille, de perquisition et de saisie. Le procès-verbal devrait contenir tous les détails qui peuvent raisonnablement y être inscrits, compte tenu des circonstances et de la quantité d'objets saisis.

266. L'exigence du procès-verbal peut toutefois poser certaines difficultés dans la mesure où la réception d'un procès-verbal par une personne pourrait éventuellement être utilisée contre elle devant un tribunal. Lorsque la possession des biens saisis devient une question en litige, toute reconnaissance tacite ou explicite de l'exactitude d'un procès-verbal pourrait constituer une preuve pertinente. Il est donc possible qu'afin de se protéger contre une telle éventualité, le saisi préfère ne pas recevoir de procès-verbal.

D. La doctrine des objets «bien en vue»

RECOMMANDATION

30. Lorsque, en effectuant une perquisition légale, ou se trouvant légalement dans un lieu, l'agent de la paix découvre des «choses saisissables se trouvant bien en vue», il devrait être habilité à les saisir sans mandat. Le cas échéant, un rapport postérieur à la perquisition et rédigé conformément à la recommandation 37 devrait être produit.

267. On peut facilement imaginer plusieurs cas où l'agent de la paix, tout en effectuant une perquisition légale, découvrirait des objets saisissables non visés par les motifs justifiant initialement son entrée dans les lieux. Par exemple, l'agent qui fouille un endroit en vertu d'un mandat visant des biens volés peut y trouver des drogues illégales. Par ailleurs, le policier qui procède à l'arrestation d'une personne dans la maison de celle-ci peut y voir une arme illégale qui ne se trouve pas à la portée de la personne et qui, partant, n'est pas visée par le critère prévu à la septième recommandation[313]. Cette hypothèse nous place dans un dilemme. Il va sans dire que dans l'intérêt de l'application du droit pénal, ces objets devraient être saisis. Pourtant, cela reviendrait à inciter les agents de la paix à profiter de l'autorisation donnée relativement à une perquisition dont la portée a été déterminée, pour se livrer à des fouilles sans retenue. Certaines dispositions particulières, comme celles du paragraphe 10(1) de la *Loi sur les stupéfiants*, permettent la saisie de choses qui ne sont pas mentionnées dans le mandat, mais qui sont liées à la perpétration de la même infraction ou d'une infraction connexe. Mais que faire lorsque les objets en cause sont liés à la perpétration d'une infraction complètement différente? Hormis les dispositions de l'article 445 du *Code criminel*, qui portent exclusivement sur les perquisitions effectuées en vertu d'un mandat délivré aux termes de

l'article 443 du *Code*[314], le droit canadien n'apporte aucune solution à ce problème. En revanche, la jurisprudence américaine y a répondu en élaborant la doctrine des choses «bien en vue».

268. En substance, cette doctrine suppose que le fait de profiter de ce que des objets liés à la perpétration d'une infraction se trouvent «bien en vue» pour les saisir, n'étend pas la portée de la perquisition au-delà de ce qui est justifié par les motifs initiaux. Par conséquent, en autorisant la saisie de ces objets, la loi ne se trouve pas à sanctionner une atteinte générale et systématique à la vie privée des gens[315]. En réalité, le seul préjudice significatif résultant de la découverte réside dans la perte, pour la personne, des choses trouvées. La saisie sans mandat de ces choses est permise parce que le préjudice souffert ne saurait l'emporter sur les inconvénients ou le danger éventuel que comporterait l'obligation pour la police d'obtenir un mandat visant spécifiquement ces objets[316].

269. La solution américaine s'inspire de la jurisprudence de la Cour suprême, qui a fixé les limites de la doctrine à partir de l'essence de celle-ci:

> [TRADUCTION]
> On a souligné que tout élément de preuve saisi par un agent de la paix se trouve habituellement «bien en vue», du moins au moment de la saisie. Par conséquent, le seul fait qu'un élément de preuve se trouve «bien en vue» au moment de la saisie n'entraîne pas nécessairement l'application de la doctrine des choses «bien en vue». Selon la Cour suprême, l'application de cette doctrine est assujettie à deux conditions: (1) celui qui voit les choses «bien en vue» doit au préalable avoir été autorisé à se trouver dans la position qui lui permet de les voir; (2) pour que la saisie des choses se trouvant «bien en vue» soit constitutionnelle, elle doit être fondée sur un mandat valide ou sur des «circonstances urgentes» justifiant le défaut d'obtenir un mandat valide[317].

Nous sommes d'avis que cette doctrine est bien fondée et nous en recommandons l'adoption en droit canadien.

270. La jurisprudence américaine laisse toutefois entendre que la doctrine des choses «bien en vue» ne saurait justifier la saisie de choses dont le caractère incriminant n'est pas évident, même si celles-ci sont «bien en vue[318]». Dans certaines décisions, on a établi des distinctions entre, d'une part, la saisie de biens de contrebande, de biens volés ou de biens dangereux, et d'autre part, la saisie d'objets n'ayant qu'une valeur probante. Toutefois, la saisie d'objets de cette dernière catégorie semble être constitutionnelle dans la mesure où ils ont été découverts par inadvertance[319]. Il serait possible de simplifier la solution américaine en excluant de la catégorie des

choses saisissables celles qui ne sont ni «le produit d'une infraction», ni des choses «dont la possession, dans les circonstances de l'espèce, constitue une infraction», mais qui n'ont qu'une valeur probante. De fait, on pourrait soutenir que cette position est reconnue implicitement par le droit canadien. À l'heure actuelle, outre celles qui sont spécifiées dans le mandat, les seules choses pouvant être saisies en vertu des dispositions de l'article 443 du *Code criminel* sont celles que l'agent croit, pour des motifs raisonnables, avoir été obtenues au moyen d'une infraction ou avoir été employées à la perpétration d'une infraction. Or, il n'est pas sûr que les choses n'ayant qu'une valeur probante soient visées par ces dispositions. Pourtant, certains objets comme des vêtements tachés de sang ou des armes possédées légalement peuvent avoir une valeur probante évidente et nous ne sommes pas convaincus qu'il soit opportun de les exclure de notre recommandation. Pour cette raison, et par souci de simplicité, nous recommandons que la doctrine des choses «bien en vue» soit applicable à toutes les choses saisissables.

IV. Les fouilles de personnes

RECOMMANDATIONS

31. Un agent de la paix peut fouiller une personne

a) désignée dans un mandat de perquisition;

b) trouvée dans un endroit ou un véhicule spécifié dans un mandat de perquisition

(i) s'il a des motifs raisonnables de croire qu'elle porte une chose saisissable spécifiée dans le mandat, et

(ii) si la personne qui a délivré le mandat a autorisé expressément, sur celui-ci, la fouille des personnes trouvées dans l'endroit ou dans le véhicule spécifié; ou

c) en vertu des pouvoirs de fouille et de perquisition sans mandat établis aux recommandations 5 à 10.

Toutefois, un «examen médical» ou une fouille de la bouche ne peuvent être exécutés qu'en conformité des recommandations 32 et 33.

32. Les règles de droit concernant les fouilles, les perquisitions et les saisies ne devraient autoriser aucun acte nécessitant la perforation

de la peau humaine. L'«examen médical» (par exemple, la fouille comportant des touchers sexuels intimes, ou l'examen du corps nu ou des orifices corporels, qui ne nécessitent pas la perforation de la peau) ne devrait être autorisé:

a) que relativement à une infraction grave définie par le Parlement;

b) qu'en vertu d'un mandat spécifique désignant la personne qui doit faire l'objet de l'examen;

c) que s'il est effectué par un médecin qualifié; et

d) que s'il est effectué dans le respect de l'intimité de la personne examinée.

33. La fouille de la bouche d'une personne ne devrait être autorisée:

a) que relativement à une infraction grave définie par le Parlement;

b) que si elle est effectuée de façon à ne pas mettre en danger la vie humaine ou la sécurité; et

c) qu'à la condition que l'agent de la paix qui effectue la fouille dresse ensuite un rapport, conformément à la recommandation 37.

A. Les motifs raisonnables

271. Il peut sembler banal d'affirmer que la loi protège les citoyens individuellement. Ainsi, les résidents d'un immeuble ne sont pas protégés de façon collective contre les voies de fait, mais bien de façon individuelle. Par conséquent, on pourrait s'attendre à ce que la protection contre les fouilles abusives comporte le même caractère individuel, c'est-à-dire qu'une personne ne puisse être fouillée à moins qu'il n'existe des motifs de fouiller *cette* personne. Or, il n'en est pas toujours ainsi. La plus importante dérogation à ce principe se trouve dans les dispositions de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, lesquelles permettent la fouille de «toute personne» se trouvant dans un lieu où l'on effectue une perquisition en vue de trouver des drogues ou des stupéfiants[320]. À la lumière de l'affaire *Jaagusta*, il semble clair que même dans les cas de fouille sans mandat, l'agent doit, avant de pouvoir fouiller une personne, avoir des motifs raisonnables de croire qu'il peut trouver des

drogues, soit sur cette personne, soit dans le lieu où elle se trouve[321]. Toutefois, la dichotomie que comporte cette règle permet apparemment à l'agent de la paix de fouiller toute personne trouvée dans un lieu, du moment qu'il est autorisé à y entrer, soit en vertu d'un mandat, soit en vertu d'une disposition de la loi.

272. Cet état de choses a été critiqué dans le rapport Pringle[322], où l'on faisait état d'un incident au cours duquel les policiers s'étaient livrés à la fouille systématique de tous les clients d'une taverne. Le rapport fait mention d'une directive émise par la Gendarmerie royale du Canada en juin 1974, et préconisant la «plus grande discrétion» dans l'exercice des pouvoirs de fouille personnelle. Cette directive interdit également les fouilles à nu [TRADUCTION] «à moins que l'enquêteur n'ait des motifs raisonnables et probables de croire que la personne porte sur elle des biens dont la possession est illégale ou qui constituent la preuve» d'une infraction. Les auteurs du rapport ont également recommandé que la personne trouvée dans un lieu autre qu'une maison d'habitation ne puisse être fouillée à moins qu'il n'existe des motifs raisonnables de croire qu'elle est en possession d'objets tendant à établir sa culpabilité[323]. Nous souscrivons à cette position. Il ne suffit pas de recommander aux policiers de faire preuve de «la plus grande discrétion» en matière de fouilles personnelles. Indépendamment des questions de principe, les données expérimentales dont nous disposons indiquent qu'en pratique, ce pouvoir est utilisé très couramment. Ainsi, au cours des 487 perquisitions effectuées sous l'autorité d'un mandat délivré en vertu de la *Loi sur les stupéfiants* ou de la *Loi des aliments et drogues*, et visées par notre étude sur le mandat, on s'est livré à 959 fouilles de personnes[324].

273. Il ressort de nos recommandations que les motifs justifiant la fouille devraient être liés à la personne que l'agent de la paix désire fouiller. Autrement dit, il doit exister, entre la personne et les choses, les fonds ou les renseignements recherchés, des rapports suffisamment étroits pour justifier la fouille. Selon nous, ce principe doit s'appliquer non seulement à la fouille de personnes trouvées au cours d'une perquisition, mais aussi à tous les cas où la fouille personnelle est autorisée, hormis le cas de l'arrestation. Notre position repose en partie sur des considérations d'ordre constitutionnel. Dans l'affaire *Ybarra*, la Cour suprême des États-Unis a jugé, en l'espèce, que chacune des personnes se trouvant dans une taverne bénéficiait d'une protection constitutionnelle individuelle contre les fouilles, les perquisitions et les saisies abusives, y compris les fouilles sommaires[325]. Cette règle est fondée sur le quatrième amendement de

la Constitution américaine, dont le libellé est analogue à celui de l'article 8 de la *Charte canadienne des droits et libertés*. Mais indépendamment de la question constitutionnelle, le principe formulé dans l'affaire *Ybarra* est selon nous bien fondé et devrait, en conséquence, être intégré à la législation canadienne.

274. Certes, nous reconnaissons que le fait d'assujettir le pouvoir de fouiller une personne à la seule existence de «motifs raisonnables» pourrait, en pratique, donner lieu à des fouilles systématiques ou injustifiées. Par exemple, le rapport Scarman publié récemment au sujet des émeutes de Brixton en Angleterre[326], offre une description de ce genre de pratiques systématisées et des conséquences alarmantes qu'elles entraînent. Or, les dangers que comportent ces pratiques redoublent d'acuité dans le cas des pouvoirs de fouille sans mandat comme ceux qui sont décrits aux recommandations 7 à 10. Quoi qu'il en soit, nous ne croyons pas qu'il y ait lieu de nier l'intérêt légitime de l'application du droit pénal, dans les cas où il existe vraiment des motifs raisonnables justifiant une fouille personnelle, sous prétexte de vouloir empêcher l'établissement de telles pratiques. Comme nous l'avons déjà expliqué, le défaut de reconnaître cet intérêt pourrait avoir pour seul effet d'inciter les policiers à se retrancher derrière les pouvoirs relativement discrétionnaires prévus par les législations provinciales en matière d'alcool, à interpréter arbitrairement le consentement ou à tenter de faire passer la fouille pour une arrestation. Nous préférons conférer à la police des pouvoirs de fouille personnelle d'une portée raisonnable, tout en incluant des garanties dans les règles de procédure, afin de limiter les possibilités d'abus.

275. Il est également permis de se demander si le critère des «motifs raisonnables» est suffisamment rigoureux dans le contexte des fouilles de personnes. Dans certaines décisions américaines portant sur les fouilles en matière de stupéfiants, le degré de preuve exigé est celui de la [TRADUCTION] «cause plausible[327]», alors que dans le cas des fouilles sommaires en matière d'armes, le critère reconnu semble être celui, moins rigoureux, du «caractère raisonnable[328]». Pour sa part, la Commission royale britannique sur la procédure pénale a adopté un critère assez confus, celui des «soupçons raisonnables[329]». À l'instar des rédacteurs du *Criminal Investigation Bill* australien, nous en arrivons à la conclusion que dans ce contexte, le critère des «motifs raisonnables» demeure le plus approprié[330]. Ce choix repose sur plusieurs arguments. D'une part, l'application de ce critère est bien établie en droit canadien, dans le domaine des fouilles, des perquisitions et des saisies. D'autre part, ce

critère est conforme à l'esprit des dispositions de l'article 8 de la *Charte canadienne des droits et libertés*. En outre, force nous est de reconnaître que l'agent de la paix qui doit, de but en blanc, décider s'il y a lieu de fouiller une personne, n'a que faire des subtilités sémantiques. Enfin, nous sommes d'avis que la véritable protection contre les fouilles abusives ne dépend que de l'attitude des agents de la paix, des personnes chargées de délivrer les mandats et des juges responsables de l'application de la loi. Appliqué de façon juste et appropriée, le critère des «motifs raisonnables» est propre à réaliser l'équilibre entre les intérêts en cause dans le cas des fouilles personnelles visées par nos recommandations.

B. Le mandat autorisant la fouille d'une personne

276. L'idée d'un mandat autorisant spécifiquement la fouille d'une personne peut sembler étrangère à l'esprit général de la procédure pénale canadienne, même si les dispositions des articles 101 et 353 du *Code criminel* paraissent autoriser la délivrance d'un tel mandat. Toutefois, le fait que de nos jours, on ait tendance à réserver l'usage du mandat aux perquisitions, résulte plus d'une évolution divergente des pouvoirs de perquisition et de fouille personnelle, que de distinctions fondamentales[331]. En réalité, si l'on admet que toute fouille, perquisition ou saisie justifiée devrait pouvoir être autorisée par un mandat, c'est l'exclusion des fouilles personnelles qui devrait sembler dérogatoire. Ce principe est maintenant sanctionné par un certain nombre de dispositions législatives[332] dans d'autres États, de sorte qu'il devient anachronique d'associer exclusivement le pouvoir de fouille personnelle au pouvoir de fouille sans mandat.

277. Il est vrai que bon nombre de fouilles personnelles, y compris celles qui sont concomitantes de l'arrestation, sont effectuées dans des circonstances urgentes. Cependant, on ne doit pas pour autant renoncer à l'existence d'un mandat applicable aux fouilles de personnes. Cela signifie seulement que l'agent de la paix doit pouvoir fouiller une personne sans mandat dans les cas qui le justifient. Par ailleurs, l'arrestation a souvent lieu dans des circonstances tout aussi difficiles. Pourtant, personne n'oserait prétendre que le mandat d'arrestation est une chose périmée. Certes, on ne peut établir d'adéquation entre les motifs qui peuvent justifier une fouille sans mandat et ceux qui peuvent justifier une arrestation sans mandat. Il n'en reste pas moins que dans les deux cas, la

question consiste à déterminer par quel mécanisme on peut autoriser l'atteinte portée aux droits de la personne visée. Si dans un cas donné, le mandat constitue une façon appropriée d'autoriser l'arrestation d'une personne, compte tenu de son caractère judiciaire et de sa spécificité, on voit mal pourquoi il n'en irait pas de même des fouilles de personnes.

278. Par ailleurs, on peut soutenir que l'instauration d'un mandat visant les fouilles de personnes n'a pas d'intérêt pratique dans la mesure où les policiers pourront toujours alléguer que l'obtention d'un mandat est matériellement impossible et continueront à fouiller sans mandat[333]. Sans nier l'importance de la question de savoir si, en pratique, les fouilles sans mandat sont effectivement limitées aux cas «d'impossibilité matérielle[334]», il n'est pas sûr que la solution à ce problème consiste à exclure les fouilles personnelles de l'application du mécanisme du mandat. En revanche, si l'on adoptait cette position, le policier ne pourrait s'adresser à un fonctionnaire judiciaire, afin d'obtenir l'autorisation de fouiller une personne, dans les cas où il jugerait possible, voire souhaitable d'agir de cette façon.

279. En outre, il est un type de fouille personnelle à l'égard duquel l'obtention d'un mandat n'est pas seulement possible mais bien essentielle: l'«examen médical». Nous reviendrons sur cette question de façon plus détaillée. Pour le moment, qu'il nous suffise de dire que la fréquence actuelle des fouilles à nu et des fouilles internes montre que l'exigence d'un mandat donnerait sans doute lieu à un grand nombre de demandes[335].

280. Cela étant dit, quel devrait être le critère applicable à la délivrance du mandat autorisant la fouille d'une personne? Cette question comporte en fait deux volets. Pour ce qui est du critère de preuve que doit appliquer la personne chargée de délivrer le mandat, rien ne paraît justifier que l'on déroge à celui des «motifs raisonnables». Par ailleurs, il est essentiel que ces motifs raisonnables soient liés directement à la personne que l'on se propose de fouiller[336]. La précision avec laquelle la personne doit être désignée est susceptible de varier suivant les circonstances de chaque cas. Il est toutefois nécessaire qu'à défaut du nom de la personne, l'agent en donne une description physique, et précise l'endroit où elle peut être trouvée[337]. Bien qu'il existe une certaine confusion parmi les décisions américaines sur la question, il semble préférable de laisser à la jurisprudence le soin d'élaborer les critères de spécificité et de précision, plutôt que de donner à ceux-ci la rigidité des textes législatifs. Du reste, les tribunaux canadiens ont élaboré des règles fort sages concernant la spécificité en matière de perquisitions,

notamment dans les affaires *Gibson*[338] et *Royal American Shows*[339]. Il n'existe aucune raison de douter qu'ils puissent en faire autant dans le domaine des fouilles de personnes.

C. La fouille de personne concomitante de la perquisition

281. À l'heure actuelle, il est rare qu'une fouille personnelle effectuée dans le cadre de l'exécution d'une perquisition ait été expressément autorisée par un mandat. Les fouilles de personnes sont plutôt considérées comme l'accessoire de la perquisition. On invoque alors, pour leur justification, diverses sources légales de pouvoir, mais dans certains cas, la chose est loin d'être évidente[340]. Tout compte fait, il existe trois solutions possibles à ce problème: (1) préciser que des fouilles personnelles peuvent être autorisées par un mandat de perquisition, ce qui, à l'heure actuelle, n'est prévu dans aucune disposition législative au Canada; (2) généraliser (avec d'éventuelles modifications) le système établi en matière de drogues et de stupéfiants, par l'établissement d'un pouvoir distinct de fouiller des personnes lors d'une perquisition effectuée en vertu d'un mandat; (3) permettre à la personne chargée de l'exécution du mandat de s'autoriser d'autres sources de pouvoir, pour se livrer à des fouilles de personnes, comme c'est le cas actuellement dans le cas de perquisitions fondées sur les dispositions de l'article 443 du *Code criminel*. Nous optons pour la première de ces solutions.

282. La troisième possibilité traduit bien l'idée que chaque fouille constitue une atteinte distincte aux droits de la personne. Toutefois, dans la mesure où l'on n'accorde aucune importance au fait que la personne ait été trouvée dans le lieu ou le véhicule faisant l'objet de la perquisition, l'agent se trouve placé dans la même situation juridique que s'il avait trouvé la personne dans la rue. Or, la faiblesse de cette solution tient justement au fait qu'il est artificiel d'extraire toutes les fouilles personnelles du contexte de la perquisition effectuée en vertu d'un mandat. Et par contexte, nous n'entendons pas le seul contexte physique, mais ce qui importe plus encore, le but global de la fouille et de la perquisition. Il peut arriver qu'un agent de la paix désire fouiller une personne pour des raisons qui sont étrangères au but de la perquisition, comme dans le cas où il craindrait que la personne porte sur elle une arme dangereuse. Mais il n'en est pas toujours ainsi. Au contraire, l'agent peut avoir intérêt à fouiller des personnes afin de retrouver les choses saisissables

spécifiées dans le mandat de perquisition. En pareil cas, la fouille de ces personnes ne peut, en toute logique, être appréciée que dans le contexte global de la perquisition.

283. La fouille personnelle, cela va de soi, est caractérisée par le fait que l'atteinte ne concerne pas seulement le domaine spatial de la personne mais aussi son intégrité physique et sa sécurité. Il est donc essentiel que toute personne se trouvant dans le lieu ou le véhicule soumis à une perquisition soit à l'abri des fouilles personnelles, à moins qu'il n'existe des motifs raisonnables de croire qu'elle est elle-même en possession d'une chose saisissable. La question critique est celle de savoir qui, de l'agent de la paix ou de la personne qui a délivré le mandat de perquisition, devrait déterminer le caractère raisonnable des motifs.

284. Confier cette responsabilité à l'agent de la paix soulève certaines objections. En effet, cela revient à lui conférer le pouvoir de se livrer à des fouilles sans mandat, sans pour autant justifier l'exclusion des mécanismes de protection qu'offre le mandat. Pourtant, on peut invoquer plusieurs arguments contre l'exigence d'un *second* mandat, une fois que l'agent est sur les lieux de la perquisition: l'urgence éventuelle des circonstances, le redoublement de la tâche administrative, et l'intérêt limité de cette demande par rapport aux inconvénients qu'elle entraîne. En conséquence, cette décision ne devrait-elle pas revenir à la personne qui délivre le mandat lors de la présentation de la demande *initiale*?

285. Le problème fondamental tient au fait que la personne chargée de délivrer le mandat peut difficilement savoir s'il est possible que la personne trouvée dans le lieu ou le véhicule porte sur elle une chose saisissable. En effet, alors que l'agent de la paix a l'avantage de connaître les circonstances entourant l'exécution de la perquisition, la personne qui a initialement délivré le mandat ne peut, elle, qu'apprécier les faits qui sont connus au moment de la demande. Dans bien des cas, au stade de la demande, rien ne permet de savoir qui se trouve dans le lieu ou le véhicule, et qui a les objets recherchés en sa possession. Dans ces conditions, les hypothèses que l'on peut faire avant le début de la perquisition sont beaucoup trop aléatoires.

286. C'est donc dire que si l'on confère à la personne qui délivre le mandat le pouvoir d'autoriser des fouilles personnelles, l'on accepte que dans une certaine mesure, sa décision repose sur des conjectures. Ce problème particulièrement épineux a été soumis aux tribunaux américains. Il s'agissait notamment de déterminer s'il était valide d'autoriser la fouille des «occupants» d'un endroit donné. Il

semble que le mandat soit valide s'il existe des motifs raisonnables de croire que toutes les personnes se trouvant sur les lieux de la perquisition projetée sont impliquées dans la perpétration de l'infraction[341]. Reconnaissant qu'aucune des personnes se trouvant sur les lieux ne pouvait être fouillée sans justification, ce qui est fort louable, les tribunaux ont considéré la question des motifs d'un point de vue collectif: dans la mesure où les motifs raisonnables invoqués concernent tous et chacun des occupants, il est valide d'autoriser qu'ils soient tous fouillés. Même s'il peut arriver que seulement quelques-uns des occupants soient ainsi impliqués, la personne qui délivre le mandat n'a d'autre choix que d'autoriser une fouille générale ou de défendre toute fouille.

287. Nous croyons que la meilleure solution à ce problème consiste à répartir entre l'agent de la paix et la personne qui délivre le mandat la responsabilité de trancher la question. Le rôle de celle-ci devrait consister à habiliter celui-là d'une façon générale. Si, lors de la délivrance du mandat initial, il semble possible que les choses saisissables spécifiées dans le mandat soient dissimulées sur les personnes se trouvant dans les lieux ou les véhicules où sera effectuée la perquisition, la personne chargée de la délivrance devrait avoir le pouvoir d'ajouter au mandat une clause autorisant l'agent à fouiller ces personnes. Le pouvoir de l'agent devrait cependant être limité à la fouille des personnes qu'il a des motifs raisonnables de soupçonner d'être en possession de choses saisissables. Non seulement cette solution offre un compromis entre le caractère «judiciaire» de la délivrance du mandat, et la situation privilégiée dans laquelle se trouve l'agent de la paix pour apprécier l'opportunité de la fouille, mais encore, elle atteste le pouvoir de l'agent de la paix aux yeux des occupants.

D. L'examen médical et la fouille de la bouche

288. Le caractère particulièrement attentatoire de l'examen des orifices corporels, des fouilles comportant des touchers sexuels intimes et des fouilles à nu est indiscutable. Si elles s'inscrivent dans le contexte général des fouilles, des perquisitions et des saisies, ces fouilles à caractère particulier peuvent également être utilisées à d'autres fins au cours d'une enquête, par exemple, en vue de prélever des substances corporelles d'un suspect sous garde. De toute façon, qu'elles constituent un aspect des fouilles, des perquisitions ou des

saisies, ou encore un aspect de ce que nous appelons les «méthodes d'investigation scientifiques», nous sommes d'avis que ces pratiques devraient être surveillées de près par la loi. Aux fins du présent document, ce type de fouille n'est visé par nos recommandations que dans l'optique des pouvoirs de fouille, de perquisition et de saisie. Dans un document de travail ultérieur, nous examinerons les règles de procédure relatives aux méthodes d'investigation scientifiques. Il va sans dire, cependant, qu'il pourrait éventuellement être nécessaire de modifier les présentes recommandations afin qu'elles soient plus en rapport avec celles que contiendra notre document de travail sur les méthodes d'investigation scientifiques. Nous nous consacrerons à cette tâche dans les rapports qui seront présentés au Parlement, d'une part, sur les fouilles, les perquisitions et les saisies, et d'autre part, sur les méthodes d'investigation scientifiques.

289. La Commission de réforme du droit de l'Australie a reconnu la nécessité de règles particulières concernant la fouille et l'examen visuel des orifices corporels et des organes sexuels. Voici un résumé de sa position:

> [TRADUCTION]
> Le but de la Commission est de restreindre le pouvoir de fouille concomitant de l'arrestation aux fouilles corporelles superficielles, c'est-à-dire celles que l'on appelle «fouilles sommaires». Les fouilles plus complètes de la surface du corps ou des divers orifices corporels ne devraient avoir lieu que dans les conditions prévues par les dispositions régissant l'examen médical. Il est évident que dans bien des cas, il est difficile de déterminer si l'acte proposé constitue une fouille, ce qui est du registre d'un agent de police, ou un examen médical qui, selon notre recommandation, ne peut, sauf le consentement de la personne, être effectué que par un médecin, à la suite d'une ordonnance du tribunal. La Commission estime que l'examen de la surface du corps, même s'il ne s'agit que d'égratignures ou d'ecchymoses superficielles, doit être considéré comme un examen médical dès qu'il constitue une atteinte quelconque à la pudeur ou à la dignité de la personne concernée, par exemple s'il est nécessaire que la personne se dévête et ainsi de suite. Il est difficile de prévoir clairement une distinction de cette nature dans une disposition législative. Pour une grande part, il appartiendra aux tribunaux d'établir les distinctions appropriées, au fur et à mesure des décisions qu'ils auront à rendre. L'application de ces règles dépendra aussi dans une large mesure de la discipline des officiers supérieurs de police et de l'attitude des agents à l'égard de ce principe[342].

290. Essentiellement, les recommandations de la Commission australienne visent trois objectifs. Premièrement, elles sanctionnent l'importance de la dignité humaine en étendant la définition de

l'examen médical au-delà de l'examen du corps, de façon à englober les fouilles à nu en général. Ce principe ressort clairement des conclusions du rapport Pringle[343]: dans le cas de fouilles à nu, l'atteinte principale réside moins dans l'examen des orifices corporels que dans le fait, pour la personne, de se dévêtir. C'est également ce qu'a soutenu la minorité des membres du "British Advisory Committee on Drug Dependance", qui préconisaient l'instauration de mécanismes de protection contre ce qu'ils appelaient l'examen «gênant» des sous-vêtements et du corps[344]. Nous souscrivons à cette position et nous recommandons que ce type d'examen soit effectué dans le respect de l'intimité de la personne.

291. Certes, on peut prétendre que quelle que soit la gravité de l'infraction, la violation de la dignité humaine que comporte l'examen du vagin ou du rectum est inadmissible dans une société où l'on se fait fort de protéger les droits individuels. Cependant, même les tenants de cette opinion reconnaissent que l'on peut avoir un intérêt légitime à rechercher certains objets dissimulés sur le corps d'une personne (par exemple, un condom contenant de l'héroïne). Ils recommandent l'adoption, par la police, d'autres méthodes comme l'incarcération et la surveillance de la personne, et l'examen constant de ses matières fécales. Or, nous voyons mal en quoi ces méthodes présentent un caractère plus noble que l'examen rectal ou vaginal pratiqué dans des conditions propices par un médecin. De fait, nous sommes enclins à penser tout le contraire. Somme toute, nous estimons que les règles énoncées dans notre recommandation sont, en l'occurence, les plus satisfaisantes relativement à ce type de fouille particulièrement désagréable pour toutes les parties en cause.

292. Deuxièmement, aux termes de la proposition australienne, la fouille rectale ou vaginale doit, le cas échéant, être pratiquée par un médecin qualifié, de façon à réduire le plus possible la douleur et les risques de blessure qu'elle comporte. Au Canada, cette préoccupation a été formulée dans le rapport Pringle[345], ainsi que dans un certain nombre de manuels de formation des policiers[346]. En n'autorisant que les «examens médicaux», la loi proposée prohibe clairement les opérations plus dangereuses du type de celles qui avaient été tentées dans l'affaire *Laporte*[347], de même que les méthodes aussi brutales que l'administration par la force de substances émétiques, méthodes qui avaient provoqué les foudres de la Cour suprême des États-Unis dans l'affaire *Rochin*[348].

293. Troisièmement, les dispositions proposées interdisent l'examen médical à moins d'une ordonnance expresse d'un tribunal. En effet, nous sommes d'avis que ces atteintes sont tellement graves

qu'elles ne devraient pas être permises à moins que l'autorisation du tribunal n'ait été obtenue au préalable. En outre, il importe de souligner que lorsque des éléments de preuve sont placés dans les divers orifices corporels, c'est généralement en vue de les dissimuler et non de les détruire. Bien qu'il soit possible que certains stupéfiants soient absorbés par les surfaces internes du corps, et soient ainsi soustraits à la saisie[349], habituellement, lorsque la police se livre à une fouille interne, c'est qu'elle croit que la substance a été soigneusement dissimulée dans le corps de la personne à des fins de transport, ce qui suppose que la personne entend préserver la substance. Par conséquent, en règle générale, on ne trouve pas dans de tels cas l'élément d'urgence justifiant le recours à une fouille sans mandat à moins, bien sûr, que la personne ne consente à être fouillée.

294. Par ailleurs, la fouille buccale constitue la principale exception aux principes que nous venons d'énumérer. Ce type de fouille est particulièrement fréquent en matière de stupéfiants. Dans l'affaire *Scott*, le juge Urie a fait le commentaire suivant au sujet de la fouille de la bouche du demandeur:

> D'après les témoignages, il est bien connu des officiers de police chargés de l'application de la loi sur les stupéfiants que les suspects cachent souvent dans leur bouche des stupéfiants placés dans un ballon ou un condom. Il a été admis qu'en pratiquant la pression sur la gorge, le sergent Siddle voulait vérifier si l'intimé dissimulait des stupéfiants dans sa bouche. En d'autres termes, il procédait à une fouille autorisée par les lois. Puisque les témoignages ont indiqué que la pression sur la gorge constitue la seule méthode satisfaisante pour récupérer les stupéfiants dissimulés dans la bouche d'un suspect et l'empêcher de les avaler pour les faire disparaître, il appert qu'il s'agit d'un acte légal, sous réserve de preuve démontrant un abus de force. À mon avis, conclure différemment rendrait dérisoire à toutes fins pratiques la recherche de stupéfiants et nuirait considérablement à l'application des articles 10(1) et 37(1)[350].

295. Effectivement, il arrive souvent qu'un suspect avale des stupéfiants pour en empêcher la saisie. Toutefois, la décision rendue dans l'affaire *Scott* n'en est pas moins inquiétante dans la mesure où elle donne caution aux fouilles buccales et ce, d'une façon générale. Pourtant, en l'espèce, on avait conclu qu'il n'existait pas de motifs raisonnables de croire que le demandeur cachait des stupéfiants dans sa bouche. La fouille avait donc été effectuée à seule fin de «vérifier» si des stupéfiants s'y trouvaient. Or, cette attitude permissive pêche contre le principe mis en évidence dans le présent document, et suivant lequel une personne ne devrait pas être soumise à une fouille à moins qu'il n'existe des motifs justifiant qu'une telle atteinte soit

portée contre elle[351]. Et une fois ces conditions remplies, encore faut-il déterminer si cette fouille devrait être visée par les dispositions relatives à l'examen médical, étant donné la douleur et le danger qu'elle peut comporter, ou si au contraire, l'intérêt de l'application de la loi ne justifie pas, en quelque sorte, une exception à l'exception.

296. La fouille buccale constitue une méthode assez brutale, cela ne fait aucun doute. Cependant, elle peut parfois être nécessaire pour empêcher la destruction d'un élément de preuve. De plus, même si elle présente le caractère attentatoire de tout autre acte de violence, elle n'est jamais aussi humiliante que les fouilles à nu et autres fouilles internes. C'est pourquoi nous recommandons que la fouille buccale ne soit pas visée par les exigences relatives à l'examen médical, c'est-à-dire être autorisée par un mandat et pratiquée par un médecin qualifié. En revanche, afin de compenser l'exclusion de ces mesures de protection, un rapport devrait être dressé après la fouille, et celle-ci ne devrait pas être exécutée dans des conditions dangereuses pour la vie humaine ou la sécurité.

297. La grande faiblesse de la proposition australienne concernant les examens médicaux réside dans le fait qu'à elle seule, la tenue de l'enquête justifie la fouille. Pour notre part, nous estimons que ce type de fouille doit être limité aux cas où l'intérêt de la société l'emporte sur la gravité de l'atteinte portée à la personne. Si les fouilles rectales, vaginales et buccales sont fréquentes en matière de stupéfiants et de drogues, il n'en reste pas moins qu'il existe une grande différence entre la fouille d'un possesseur de marijuana et celle d'un trafiquant d'héroïne. La Gendarmerie royale du Canada a elle-même reconnu cette distinction dans son manuel des opérations:

> [TRADUCTION]
> Lorsqu'il effectue une enquête portant sur de petites quantités de cannabis, le membre de la Gendarmerie ne doit pas avoir recours aux techniques d'enquête utilisées dans le cas d'infractions relatives à l'héroïne ou à d'autres stupéfiants du même type. On considérera normalement comme abusif le fait de saisir une personne par la gorge, ou de forcer un suspect à se dévêtir complètement ou à se soumettre à une fouille interne. Le membre de la Gendarmerie qui a recours à ces techniques doit être en mesure de justifier ses actes[352].

298. La Commission de réforme du droit du Canada s'emploie actuellement à revoir la classification des infractions au sein du *Code criminel*, et il est difficile, au regard de la législation pénale actuelle, de formuler un critère uniforme permettant de distinguer les infractions qui justifient le recours à l'examen médical, de celles qui ne le justifient pas. Par conséquent, il y a sans doute lieu de reprendre

la solution adoptée par les rédacteurs de la loi actuelle sur l'écoute électronique, c'est-à-dire restreindre l'application du régime aux seules infractions dont la liste est donnée par le Parlement dans une disposition définitoire particulière[353]. C'est là la position adoptée par le "Victoria Chief Justice's Law Reform Committee", et à laquelle nous nous rallions.

V. La divulgation de renseignements sur les fouilles, les perquisitions et les saisies

299. Une fois la fouille, la perquisition ou la saisie terminée, la police dispose censément de renseignements importants sur la personne visée. À tout le moins, la police sait pourquoi et comment la perquisition a été effectuée, et si quelque chose a effectivement été saisi. Si la fouille, la perquisition ou la saisie a été exécutée en vertu d'un mandat, la personne qui a délivré celui-ci devrait également être en possession des renseignements fournis dans la demande de mandat. Il va sans dire que les faits portés à la connaissance de la police ou de la personne qui a délivré le mandat, le cas échéant, ont un grand intérêt pour la personne qu'ils concernent. Ils peuvent également présenter un intérêt pour une institution comme la presse, qui n'est pas vraiment concernée par l'enquête. Et le fait que l'institution s'intéresse à ces renseignements peut également être important pour la personne: la diffusion d'informations par la police peut se traduire par la divulgation de renseignements personnels sur sa vie et ses activités. La police, de son côté, peut souhaiter ne pas divulguer ces renseignements, afin de préserver ses sources et de ne pas compromettre le succès de son enquête.

300. Les règles régissant la divulgation des renseignements concernant les fouilles, les perquisitions et les saisies soulèvent principalement le problème de l'obligation de rendre compte. À cet égard, les différences entre, d'une part les fouilles, les perquisitions et les saisies avec mandat et, d'autre part, les fouilles, les perquisitions et les saisies sans mandat, sont d'une importance capitale. Dans le premier cas, le juge de paix devrait être responsable à partir du moment où il statue sur la demande qui lui a été présentée. Même si dans certaines régions, l'obtention du mandat est devenue une formalité soumise aux tractations de la police, il n'en reste pas

moins qu'en ce qui a trait à l'obligation de rendre compte, le dossier contenant la dénonciation et la demande de mandat fournit des renseignements importants en cas de contestation. En outre, le rapport qui, aux termes de l'article 443, doit être rédigé par suite de l'exécution du mandat contribue également à sanctionner cette obligation. Alors pourquoi la personne soumise à une fouille ou à une perquisition sans mandat ne pourrait-elle bénéficier de ces mécanismes de protection?

301. Dans une certaine mesure, la réponse à cette question réside dans les distinctions qui existent entre les sources des pouvoirs de l'agent de la paix dans chaque cas. Autrefois, le mandat était un document au moyen duquel le juge de paix déléguait à l'agent de la paix l'exécution de ses fonctions liées à l'application de la loi. De nos jours, il subsiste certains vestiges de cet usage, comme le rapport du mandat et des biens saisis au juge de paix, aux termes de l'article 443 du *Code criminel*. En revanche, lorsque l'agent de la paix agit sans mandat, il tient son pouvoir directement de la loi. En l'absence de toute disposition de la loi l'obligeant à rendre compte de l'exercice de ce pouvoir à un officier supérieur, soit sur le plan administratif, soit à l'intérieur du processus d'application de la loi, il n'est pas tenu de le faire. Mais la différence essentielle, sur le plan de l'obligation de rendre compte, réside dans le fait que seul le mécanisme du mandat comporte un caractère «judiciaire». C'est pourquoi on y retrouve plusieurs règles sanctionnant l'obligation de rendre compte. En revanche, il semble que l'on n'ait pas jugé opportun d'adopter des règles analogues dans le cas des fouilles et des perquisitions sans mandat.

302. Mais ce contraste est-il toujours justifié? Dans la réalité actuelle, l'agent de la paix n'est plus le subordonné chargé d'aller accomplir les fonctions que lui a confiées le juge de paix. Au contraire, l'agent est presque toujours celui qui met en branle le processus du mandat, vérifie le bien-fondé de la plainte qui en est la source, et prépare la demande de mandat, laquelle sera ensuite signée par le juge. En outre, il importe surtout de reconnaître que si le caractère «judiciaire» est essentiel au mécanisme du mandat, on aurait tort de considérer ce caractère comme le fondement du contrôle de l'exercice des pouvoirs de fouille, de perquisition ou de saisie avec mandat. En fait, les mécanismes de protection de nature «judiciaire» sont eux-mêmes accessoires. Ils ont été incorporés au mécanisme du mandat en raison de l'importance que l'on attache à la protection des citoyens contre l'exercice abusif de ces pouvoirs.

303. Lorsque nous avons élaboré les recommandations concernant la conservation et la divulgation des renseignements relatifs aux fouilles, aux perquisitions et aux saisies, nous avons tenté d'établir l'équilibre entre les caractéristiques qui distinguent les fouilles et les perquisitions avec mandat de celles qui sont effectuées sans mandat. Sans nier l'importance des facteurs que nous avons décrits ci-dessus, nous avons voulu rendre uniformes les mécanismes de sanction de l'obligation de rendre compte dans les deux cas.

A. Les fouilles et les perquisitions avec mandat

RECOMMANDATIONS

34. La personne qui délivre un mandat de perquisition devrait avoir le pouvoir d'exclure certaines personnes lors de l'audition de la demande de mandat, s'il lui apparaît que les fins de la justice seront mieux servies ainsi.

35. La personne soumise à une fouille, à une perquisition ou à une saisie devrait pouvoir examiner le mandat et la dénonciation sous serment immédiatement après l'exécution du mandat. Toute autre personne devrait également avoir accès à ces documents, mais ne devrait pas pouvoir en publier ni en diffuser le contenu jusqu'à ce que:

a) l'interdiction soit levée, à la demande de la personne visée, par un juge d'une cour supérieure, ou par un juge au sens des dispositions de l'article 482 du *Code criminel*,

b) la personne visée soit libérée à l'issue de l'enquête préliminaire, ou

c) le procès de la personne visée soit terminé.

36. Si la divulgation du contenu d'une dénonciation ou d'un mandat est susceptible de révéler l'existence d'un processus de surveillance électronique, la personne qui délivre le mandat devrait, à la demande de la Couronne ou d'un agent de la paix, avoir le pouvoir de garder secret tout numéro de téléphone mentionné dans le document, et d'y substituer un code. De même, si l'identité d'un informateur confidentiel risque d'être révélée, l'agent de la paix ou la personne qui délivre le mandat devrait avoir le pouvoir de garder secret le nom ou la désignation de l'informateur, et de les remplacer par un code. La personne qui délivre le mandat devrait alors certifier que les seuls

renseignements ainsi cachés sont soit les chiffres d'un numéro de téléphone, soit le nom ou la désignation d'un informateur, selon le cas.

304. Les recommandations qui précèdent reflètent en partie la décision rendue récemment par la Cour suprême du Canada dans l'affaire *MacIntyre*, où il s'agissait principalement de déterminer si le public devait avoir accès aux dossiers relatifs à l'exécution d'un mandat de perquisition. Par une majorité de cinq contre quatre, la Cour a adopté une position prudente en faveur de l'accès du public à ces documents. Rendant jugement au nom de la majorité, le juge Dickson[354] a décidé qu'une fois le mandat exécuté et les objets rapportés devant le juge de paix, toute personne est généralement en droit d'examiner le mandat et les renseignements fournis à l'appui de la demande. Dans sa dissidence, le juge Martland[355] s'est dit d'avis que l'accès à ces documents devrait être réservé aux personnes ayant un intérêt direct et manifeste. Selon le juge Martland, l'intimé, qui était reporter, ne faisait pas partie de cette catégorie, dans la mesure où il ne détenait pas un intérêt supérieur à celui du public en général. Dans cette décision, la Cour suprême n'a fait que réaffirmer certains principes de common law. Il appartient au législateur de les modifier par voie législative s'il le juge opportun. Nous estimons que par souci de clarté, des dispositions législatives devraient être adoptées afin de répondre à trois questions soulevées par cette affaire. L'accès du public à l'audition de la demande devrait-il être restreint? La personne soumise à une fouille ou à une perquisition devrait-elle avoir le droit d'examiner le mandat et la dénonciation sous serment, et dans l'affirmative, à quelles conditions? Le public, la presse et les media devraient-ils avoir accès à ces mêmes documents, et dans l'affirmative, à quelles conditions?

305. Dans l'affaire *MacIntyre*, la Cour d'appel de la Nouvelle-Écosse avait décidé que la délivrance du mandat de perquisition était un acte judiciaire accompli en audience publique: [TRADUCTION] «Le public pourrait avoir droit d'être présent à ce moment-là et d'entendre la teneur de la dénonciation soumise au juge de paix quand on lui demande d'exercer le pouvoir qu'il possède de délivrer le mandat[356]». De façon unanime, la Cour suprême du Canada a rejeté cette position. Voici les commentaires du juge Dickson:

> L'administration efficace de la justice justifie que le public soit exclu des procédures qui portent sur la délivrance même du mandat. Les procureurs généraux ont démontré, à ma satisfaction du moins, que si la demande de mandat se déroulait en audience publique, la recherche

d'objets relatifs au crime serait, au mieux, grandement entravée et, au pire, rendue tout à fait vaine[357].

Nous souscrivons à cette position et en conséquence, nous recommandons que la loi confère à la personne qui délivre le mandat le pouvoir d'exclure toute personne de l'audition de la demande de mandat.

306. La nécessité de garder secrets les renseignements relatifs à l'audition de la demande de mandat est moins grande une fois terminée l'exécution du mandat. En effet, la personne concernée est désormais au fait de l'enquête de la police en raison de la perquisition elle-même, d'une part et, d'autre part, la police a déjà eu la possibilité d'effectuer la saisie autorisée. Dans l'affaire *MacIntyre*, la Cour suprême du Canada a reconnu unanimement qu'à ce stade, il était opportun de permettre à la personne visée d'avoir accès au mandat et à la dénonciation. Ce principe avait été formulé de façon plus concise dans l'affaire *Realty Renovations Ltd.*, qui a précédé l'affaire *MacIntyre*:

> [TRADUCTION]
> Il est absolument clair que toute partie intéressée a le droit de demander l'annulation d'un mandat de perquisition délivré par suite d'une dénonciation comportant des irrégularités. Pour être en mesure de faire une telle demande, le requérant doit pouvoir examiner la dénonciation et le mandat, et ce, immédiatement après l'exécution du mandat[358].

Nous avons repris ce principe à la recommandation 35.

307. Permettre au grand public et aux institutions qui le représentent, comme la presse, l'accès aux documents relatifs au mandat comporte certains avantages qui peuvent aller de pair avec l'intérêt de la personne visée. Cependant, il n'en est pas toujours ainsi. Ainsi, comme dans l'affaire *MacIntyre*, il est possible que l'intention du journaliste soit autant de rendre publiques les activités de la personne visée que de vérifier la légalité de l'action policière. L'intérêt du public entre alors en conflit avec le droit de la personne à sa vie privée. Étant donné la portée tentaculaire des media, les renseignements relatifs à une fouille ou à une perquisition peuvent mettre la personne dans une situation très gênante. Du côté fédéral, la *Loi sur la protection des renseignements personnels* interdit la divulgation de «renseignements relatifs [au] casier judiciaire» d'une personne[359]. Par ailleurs, le droit américain reconnaît explicitement que la divulgation de renseignements relatifs à une enquête criminelle peut constituer une atteinte à la vie privée[360]. Pourtant, le législateur n'en a pas moins soustrait les tribunaux à l'application de la législation relative aux renseignements personnels. Pour assurer le

sérieux et l'équité des procédures judiciaires, il est nécessaire de les soumettre au jugement du public, ce qui peut éventuellement impliquer la divulgation de faits compromettants pour certains citoyens[361].

308. Dans l'affaire *MacIntyre*, la majorité des juges ont répondu à cette question en se fondant sur le principe de la «protection de l'innocent». Ils ont décidé que lorsqu'un mandat de perquisition est délivré et exécuté sans que rien ne soit trouvé, la vie privée du citoyen devait l'emporter sur l'accès du public aux renseignements concernant la perquisition. En revanche, lorsque des choses sont saisies, l'intérêt du public pour ces renseignements devait prévaloir[362]. Pour notre part, nous hésitons à établir un lien aussi direct entre les résultats d'une perquisition et l'innocence ou la culpabilité de la personne qui y est soumise. En effet, une personne coupable peut s'être débarrassée des choses saisissables, alors qu'un innocent peut être en possession d'éléments de preuve saisissables en vertu d'un mandat. Nous croyons qu'il est préférable d'établir une distinction entre, d'une part, l'accès au mandat et à la dénonciation et, d'autre part, la publication du contenu de ces documents.

309. Il importe de reconnaître que l'intérêt, pour le public, de la publication de ces renseignements augmente avec la venue du procès. En fait, la divulgation des renseignements relatifs à la procédure antérieure au procès pourrait aussi bien miner l'intégrité du système judiciaire que la renforcer. En effet, il est possible que des preuves rendues publiques ne soient pas utilisées au procès. En outre, la divulgation de ces renseignements peut faire croire à la culpabilité de la personne avant même qu'une accusation n'ait été portée. La première de ces préoccupations s'est traduite par l'adoption, dans les dispositions du paragraphe 24(2) de la *Charte canadienne des droits et libertés*, d'une règle d'exclusion conditionnelle concernant les éléments de preuve illégalement obtenus[363]. Il convient également de noter que l'audition de la demande de mandat, bien qu'elle relève de la procédure pénale, n'a pas pour but de déterminer la culpabilité ou la responsabilité de l'accusé, contrairement au procès où la publicité constitue une garantie de justice et d'équité.

310. Le meilleur argument que l'on puisse invoquer à l'encontre de la restriction de la publicité est celui de la «liberté de presse». Sanctionné par la *Déclaration canadienne des droits*[364], ce principe a été mis en application par la Cour d'appel du Manitoba dans l'affaire *F.P. Publications*. La Cour a annulé une ordonnance interdisant à un journaliste d'assister à un procès, reconnaissant ainsi le droit du journaliste de divulguer le nom des témoins au procès,

malgré les ennuis que cela pouvait causer à ces derniers[365]. Toutefois, bien que les juges de la majorité aient défendu les droits de la presse avec une certaine vigueur, on aurait tort d'appliquer les principes formulés dans cette décision en dehors du contexte du procès proprement dit. D'ailleurs, deux dispositions du *Code criminel* énoncent clairement qu'avant le procès, la liberté de presse doit parfois être refrénée lorsque la personne ne souhaite pas que les renseignements concernant l'enquête dont elle fait l'objet soient rendus publics.

311. Lors de l'enquête préliminaire ou de l'enquête sur cautionnement, le juge de paix doit, à la demande de l'accusé, rendre une ordonnance de non-publication visant la preuve et les plaidoyers[366]. Cette ordonnance reste en vigueur, soit jusqu'à la libération de l'accusé à l'issue de l'enquête préliminaire, soit jusqu'à la fin du procès. Or, la perquisition effectuée en vertu d'un mandat précède généralement l'enquête préliminaire aussi bien que l'enquête sur cautionnement. En outre, lors de l'audition de la demande de mandat, contrairement à l'accusé, la personne dont le nom figure sur le mandat n'est pas toujours inculpée d'une infraction. Pourtant, en ce qui concerne l'intérêt public ou celui de la presse, la divulgation des faits relatifs à l'enquête des policiers, contre la volonté de la personne, n'est guère plus justifiée lors de l'audition de la demande de mandat que dans les cas où l'on a reconnu la nécessité d'imposer une ordonnance de non-publication.

312. L'audition de la demande de mandat se distingue des deux types d'enquêtes dont nous venons de parler dans la mesure où la personne visée, qui n'y assiste pas, ne peut demander la protection que le tribunal peut offrir à l'accusé. En conséquence, nous recommandons que lors de la délivrance du mandat de perquisition, la publication des renseignements relatifs à l'enquête soit automatiquement interdite, à des conditions semblables à celles de l'ordonnance qui peut être rendue dans le cas de l'enquête préliminaire ou de l'enquête sur cautionnement, cette interdiction pouvant être levée à la demande de la personne visée. Toutefois, le droit de la personne de faire lever l'interdiction ne devrait pas être absolu. Par exemple, l'examen du mandat ou de la dénonciation sous serment peut entraîner la divulgation de faits concernant d'autres personnes. S'il est possible que certaines d'entre elles désirent également que les renseignements soient publiés, il n'en est pas nécessairement de même pour toutes. Les questions complexes que poserait une situation semblable pourraient être tranchées avec la souplesse appropriée par un juge d'une cour supérieure.

313. Nous admettons que le fait de permettre au public, quoique à certaines conditions, d'avoir accès aux documents relatifs au mandat de perquisition comporte certains risques. Les représentants de la police et du ministère public prétendent qu'une telle mesure peut inciter les policiers à se montrer plus laconiques dans la rédaction de leurs demandes. Quoi qu'il en soit, il importe de replacer cet argument dans une juste perspective. Certains documents, notamment en matière de crimes économiques, sont préparés avec une minutie d'orfèvre. Il est donc normal que les personnes qui préparent ces documents voient d'un mauvais œil la divulgation des noms et des sources qui s'y trouvent. Cependant, bon nombre de ces détails sont vraisemblablement superflus au regard des critères juridiques qui régissent les demandes et les mandats. Dans les autres cas, les documents relatifs au mandat sont souvent insuffisants par rapport à ces critères. En effet, 58,9 pour cent des mandats examinés par le comité des juges ont été jugés non valables. Parmi ceux qui ont été jugés valides, la description des objets, des lieux, des infractions et des motifs était souvent à peine suffisante. La publication des documents pourrait avoir pour effet d'éliminer ces deux extrêmes: supprimer la prolixité, d'une part, et assurer le respect des critères, d'autre part. S'il devait en être ainsi, nous croyons que la réalisation du second objectif compenserait les inconvénients entraînés par la suppression des détails.

314. Par ailleurs, le fait de permettre au public d'avoir accès aux mandats de perquisition pourrait éventuellement avoir des conséquences fâcheuses dans le domaine de l'écoute électronique. Comme nous l'avons déjà souligné, lorsqu'il s'agit de statuer sur le bien-fondé d'une demande de mandat fondée sur des renseignements obtenus par l'écoute électronique, le facteur déterminant réside, non pas dans le fait de l'écoute électronique, mais bien dans les renseignements qu'elle révèle. Toutefois, il existe un type de perquisition dans lequel le fait de l'écoute électronique est inévitablement divulgué, tant dans la dénonciation que dans le mandat: la perquisition ayant pour objet des documents relatifs au numéro de téléphone lui-même. Ces perquisitions ont souvent lieu dans les locaux des sociétés de téléphone[367]. Si le fait de la perquisition était connu du public, la personne concernée pourrait être alertée. Afin d'éviter cette difficulté, on pourrait conférer aux fonctionnaires judiciaires le pouvoir d'effacer le numéro de téléphone et de le remplacer par un code, à la demande des policiers ou du ministère public. Dans la mesure où la personne qui délivre le mandat certifie que le code correspond à un numéro de téléphone particulier, le public n'est pas vraiment frustré de la possibilité de juger les

critères applicables au mécanisme du mandat. Nous recommandons l'adoption de règles semblables concernant l'identité des informateurs confidentiels.

315. Lorsque nous avons élaboré les recommandations 34, 35 et 36, nous avons tenu compte, d'une part, de la controverse que soulève la décision rendue dans l'affaire *MacIntyre*, et d'autre part, des difficultés qui peuvent survenir lorsque les policiers sont tenus de faire état d'enquêtes complexes et délicates lors d'une audience publique. Même si nous avons tenté, dans ces recommandations, d'établir un équilibre entre ces considérations antagoniques, nous sommes conscients que d'aucuns trouveront que nous n'avons pas mis suffisamment d'accent sur le caractère confidentiel, alors que d'autres jugeront nos propositions trop restrictives. Nous comptons sur les commentaires et les critiques que l'on voudra bien nous faire à propos de nos recommandations actuelles, en vue d'élaborer les dispositions définitives concernant la divulgation des renseignements relatifs aux fouilles, aux perquisitions et aux saisies avec mandat. Ces dispositions feront partie de nos rapports définitifs sur les pouvoirs et les méthodes de la police.

B. Les fouilles et les perquisitions sans mandat

RECOMMANDATION

37. L'agent de la paix devrait être tenu de remplir un rapport postérieur à la fouille ou à la perquisition dans les cas suivants:

a) lorsque des choses ont été saisies sans mandat,

b) lorsque des choses non spécifiées dans le mandat ont été saisies lors d'une perquisition autorisée par un mandat, conformément à la recommandation 24,

c) lorsqu'une fouille buccale est effectuée, conformément à la recommandation 33.

Le rapport devrait faire état de l'heure et du lieu de la fouille, de la perquisition ou de la saisie, des motifs qui y ont donné lieu, ainsi que des choses saisies. Toute personne visée par la fouille, la perquisition ou la saisie devrait avoir accès à ce rapport sur demande.

316. Le fait qu'une fouille, une perquisition ou une saisie ait lieu dans des circonstances qui justifient une dérogation à l'exigence

du mandat ne supprime par pour autant l'obligation de rendre compte. On pourrait même prétendre qu'il y a lieu de renforcer les mécanismes sanctionnant cette obligation, de façon à en faire des mesures de protection non plus *secondaires*, mais *de première importance*, contre les fouilles et les perquisitions abusives. Toutefois, nous ne croyons pas qu'il soit opportun que toutes les fouilles, les perquisitions et les saisies sans mandat soient, de façon systématique, consignées dans des rapports, de manière à constituer des dossiers aussi détaillés que dans le cas où les policiers ont agi en vertu d'un mandat. Notre position repose en partie sur l'importance qu'il faut accorder au caractère judiciaire, dans le cas du mandat. En outre, la règle contenue à la recommandation 27, concernant la divulgation des motifs de la fouille ou de la perquisition, contribue, dans une certaine mesure, à sanctionner l'obligation de rendre compte et à assurer l'accès à l'information. Par ailleurs, trois autres facteurs doivent être pris en considération: (1) les coûts qu'impliquerait le fait de constituer, dans tous les cas où une fouille, une perquisition ou une saisie est effectuée sans mandat, un dossier comportant toutes les caractéristiques de celui qui est établi lorsqu'il existe un mandat, (2) l'importance de l'atteinte aux droits privés que comportent les diverses formes de fouille, de perquisition et de saisie, et (3) les dangers qu'entraîne l'augmentation de telles exigences.

317. Nous n'étonnerons personne en disant que la rédaction de rapports alourdit la tâche de la police et constitue un gaspillage de ressources. En pratique, ce «gaspillage» a toujours correspondu à la paperasse dont chaque agent de la paix doit se charger. Or, récemment, des systèmes d'informatisation permettant le traitement et la conservation des renseignements obtenus par la police ont contribué à réduire ces pertes de temps et d'énergie. Le surcroît de travail qu'impliquerait, sur le plan administratif, la rédaction systématique de rapports concernant les fouilles, les perquisitions et les saisies sans mandat dépend de la mesure dans laquelle les systèmes d'informatisation peuvent être mis à contribution. Quoi qu'il en soit, la mise en œuvre de telles exigences imposerait des contraintes supplémentaires aux forces de police dont la tâche administrative est déjà lourde. Nous croyons en effet que malgré la prééminence que nous donnons en principe à l'utilisation du mandat, et en dépit des améliorations du mécanisme du mandat que nous avons suggérées, les fouilles et les perquisitions sans mandat, surtout dans le cas des personnes et des véhicules, continueront d'être beaucoup plus fréquentes que les fouilles et les perquisitions effectuées en vertu d'un mandat.

318. Cette dépense de ressources est-elle justifiée par les avantages que comporte l'enregistrement systématique des renseignements? Il est juste de dire que toute atteinte à la liberté humaine ou à l'intégrité physique constitue une violation de valeurs auxquelles le droit canadien a toujours attaché une grande importance, comme en témoignent les dispositions de la nouvelle *Charte canadienne des droits et libertés*. Toutefois, il semble que dans bon nombre de cas, l'atteinte portée est assez limitée, notamment dans le cas de fouilles infructueuses de véhicules ou de personnes, où l'acte de la police peut n'avoir été qu'une atteinte légère et passagère aux droits de la personne: l'agent peut s'être livré à une fouille sommaire afin de s'assurer que la personne ne porte pas d'armes ou de biens volés, suite à quoi cette dernière peut passer son chemin. Même s'il est essentiel de restreindre de tels incidents aux cas qui le justifient vraiment, il est permis de se demander si la réalisation de cet objectif justifie que l'on impose d'aussi lourdes obligations administratives à la police dans tous les cas de fouilles, de perquisitions et de saisies.

319. Cet argument prend encore plus de poids lorsque l'on considère les effets qu'aurait la création d'un tel système d'enregistrement des renseignements sur la vie privée des citoyens. On peut déjà prévoir qu'il serait possible d'utiliser les ordinateurs pour le traitement et la conservation des renseignements concernant les fouilles, les perquisitions et les saisies sans mandat. Les problèmes liés à l'invasion de la vie privée par les ordinateurs dépassent largement le contexte de l'application du droit pénal, et les controverses qu'ils ont suscitées sont loin d'être réglées[368]. En ce qui concerne les fouilles, les perquisitions et les saisies, la perspective de voir enregistré par un ordinateur tout incident au cours duquel une personne est fouillée par un agent de la paix se rapproche dangereusement de la vision d'Orwell, et n'a rien de rassurant pour le citoyen que les mécanismes de fouille, de perquisition et de saisie ont pour but ultime de protéger. Et si l'on devait même envisager la possibilité que le public ait accès à ces renseignements, ces dangers prendraient des proportions catastrophiques.

320. Dans nos recommandations, nous avons tenté de créer un équilibre acceptable entre les intérêts en cause et les arguments formulés ci-dessus. De façon générale, l'obligation de dresser un rapport ne devrait pas naître du seul fait de l'exécution d'une fouille ou d'une perquisition sans mandat, mais plutôt de l'existence de certaines circonstances. Premièrement, l'arrestation comporte ses propres exigences à cet égard, lesquelles font l'objet d'un autre document de travail de la Commission. Deuxièmement, sur le plan

administratif, la police devrait conserver l'autorisation écrite prévue à la recommandation 6 dans tous les cas où une fouille ou une perquisition est effectuée avec le consentement de la personne visée. Troisièmement, lorsqu'une fouille comporte un acte particulièrement attentatoire comme la fouille de la bouche, la rédaction d'un rapport postérieur à l'acte devrait être obligatoire[369]. Quatrièmement, un rapport devrait aussi être obligatoire dans les cas où des biens sont saisis sans mandat.

321. Les directives de la Gendarmerie royale du Canada concernant les mandats de main-forte énoncent de façon détaillée les exigences relatives aux rapports devant être rédigés après l'accomplissement d'une fouille, d'une perquisition ou d'une saisie. On en trouve un autre modèle dans le *Code de l'A.L.I.*:

> [TRADUCTION]
> *Rapport de saisie*: Dans tous les cas où une saisie est effectuée autrement qu'en vertu d'un mandat de perquisition, l'agent qui effectue la saisie doit, dès que la chose est raisonnablement possible, faire rapport par écrit des faits et des circonstances de la saisie, et fournir une liste des choses saisies [au juge d'un tribunal habilité à connaître de l'infraction dont la perpétration est révélée par la saisie][370].

Nous recommandons que soit adoptée en droit canadien une règle exigeant que l'agent de la paix rédige postérieurement à la fouille ou à la perquisition, un rapport faisant état de l'heure, de la date et du lieu de la fouille, de la perquisition ou de la saisie, des motifs qui y ont donné lieu, ainsi que des choses saisies, le cas échéant.

CHAPITRE HUIT

Les exceptions aux règles générales

322. Dans les trois chapitres qui précèdent, nous avons tenté d'élaborer un régime de pouvoirs de fouille, de perquisition et de saisie qui soit équilibré, tant sur le plan des justifications que sur celui des règles de procédure. En outre, par souci de cohérence et de simplicité, nous avons voulu donner à ce régime un caractère uniforme et général. Pourtant, même si nous nous sommes inspirés de l'ensemble des règles et des pratiques actuelles, il reste des cas où les règles que nous proposons ne peuvent être appliquées efficacement. En effet, certains cas de fouille, de perquisition et de saisie comportent des circonstances particulières et mettent en cause des intérêts très importants, de sorte qu'ils ne peuvent être réglés que par des dispositions d'exception.

323. Dans le présent chapitre, nous examinerons la nécessité de règles exceptionnelles en deux étapes. Dans un premier temps, nous nous attaquerons aux problèmes que nous avons abordés précédemment et qui méritent une attention particulière, à savoir: la fouille de personnes non impliquées dans la perpétration de l'infraction, le gel de provisions bancaires et la saisie de choses chez les avocats et dans les locaux de la presse. Nous tenterons de déterminer, à l'égard de chacun de ces cas, les ajustements qui devraient être faits, afin de tenir compte des facteurs exceptionnels qu'ils comportent. Dans la seconde partie du chapitre, nous traiterons du problème particulièrement difficile de l'entrée clandestine.

I. Les problèmes particuliers liés à la personne fouillée ou à la chose saisissable

A. La personne qui n'est pas soupçonnée

RECOMMANDATION

38. Lorsque la personne qui se trouve en possession de choses «saisissables» n'est pas soupçonnée d'avoir participé à la perpétration de l'infraction ayant donné lieu à la perquisition, l'agent de la paix qui exécute la perquisition devrait généralement être tenu de demander à cette personne de produire les choses en question. Toutefois, l'agent devrait avoir le pouvoir d'effectuer lui-même la perquisition:

a) si la personne refuse d'obtempérer dans un délai raisonnable; ou

b) s'il a des motifs raisonnables de croire qu'une telle demande peut entraîner la destruction ou la perte des choses en question.

324. Une fois admise la distinction entre, d'une part, les pouvoirs de fouille, de perquisition et de saisie et, d'autre part, les pouvoirs d'arrestation et de mise en accusation, il est possible que la police désire exercer les premiers à l'égard d'une personne qui se trouve en possession des choses saisissables mais qui, par ailleurs, n'est pas soupçonnée d'avoir participé à l'infraction à laquelle ces objets sont liés. On aurait tort de croire qu'il s'agit là d'une hypothèse d'école. En effet, les fouilles ou les perquisitions relatives à des personnes non soupçonnées d'infraction représentent une grande partie, sinon la majorité, des fouilles et des perquisitions effectuées en vertu d'un mandat. Parmi les mandats soumis au comité des juges lors de l'enquête de la Commission, 20 pour cent autorisaient de telles fouilles ou perquisitions. Par contre, dans 63 pour cent des cas, il était précisé dans la demande (dans la dénonciation ou le rapport écrit) que le propriétaire ou l'occupant était impliqué dans la perpétration de l'infraction. Dans les autres cas, soit 17 pour cent des mandats examinés, il a été impossible de déterminer, à partir des documents, si la personne était soupçonnée d'avoir participé à l'infraction[371].

325. Parmi les personnes qui peuvent être soumises à une fouille ou à une perquisition, sans pour autant être soupçonnées, on

compte les banques, les compagnies de téléphone, les organismes de presse, les services de messageries, les avocats, de même que les connaissances des personnes soupçonnées. Dans un certain nombre de ces cas, les facteurs exceptionnels qui entrent en jeu exigent l'adoption de règles particulières, compte tenu de la nature de la personne visée. Par ailleurs, deux questions d'ordre plus général se posent. En premier lieu, les personnes qui ne font l'objet d'aucun soupçon devraient-elles jouir de l'immunité à l'encontre de l'exercice des pouvoirs de fouille, de perquisition et de saisie? En second lieu, à défaut d'immunité complète, quelles sont les mesures de protection particulières qui devraient être prises à leur égard, étant donné qu'elles ne sont pas soupçonnées d'avoir participé aux activités criminelles alléguées?

326. Au Canada, aucune autorité n'est allée jusqu'à prôner l'immunité complète. Tout au plus s'est-on contenté de recommander l'adoption de méthodes moins coercitives en vue d'obtenir les choses ou les renseignements en question dans de tels cas. Parmi ces méthodes se trouvent la demande de production et le *subpoena duces tecum*. Dans l'affaire *Pacific Press Ltd.*, le juge Nemetz, juge en chef de la Colombie-Britannique, a décidé qu'avant de pouvoir délivrer validement un mandat autorisant des perquisitions dans les locaux du journal en cause, le juge de paix aurait dû exiger des documents montrant s'il existait une autre façon raisonnable d'obtenir les renseignements et, le cas échéant, que des mesures raisonnables avaient été prises afin d'obtenir les renseignements par cette méthode[372]. Nous nous inscrivons en faux contre cette position pour deux raisons.

327. En premier lieu, cela revient à passer outre au principe, maintenant bien établi, suivant lequel les fouilles, les perquisitions et les saisies ont pour but non seulement de recueillir des éléments de preuve en vue du procès, mais également de fournir des renseignements à la police. Par ailleurs, comme on a souvent recours au mandat de perquisition avant même que les suspects aient été identifiés de façon suffisante pour porter des accusations, il serait difficile de savoir quelle méthode utiliser à l'égard de telle ou telle personne. La décision d'accorder le bénéfice du doute à une personne et de ne pas effectuer de fouille ou de perquisition pourrait éventuellement entraîner la perte des choses recherchées.

328. En second lieu, cette attitude restrictive semble tenir pour acquis que l'exercice des pouvoirs de fouille, de perquisition et de saisie comporte toujours un caractère coercitif. Certes, on peut considérer que le fait de mettre les objets recherchés sous main de

justice est coercitif en soi. Dans ces conditions, la méthode du *subpoena duces tecum* doit être aussi considérée comme coercitive dans la mesure où les choses doivent être produites conformément à l'ordre donné. Évidemment, au contraire de la citation à comparaître, la fouille et la perquisition impliquent une participation active de la police dans la recherche de l'objet, et l'immixtion de la police dans la vie privée des citoyens. Il est cependant possible que l'on ait exagéré l'importance de cette distinction. En réalité, comme la citation à comparaître doit être signifiée personnellement par un agent de la paix[373], l'intervention de la police n'est pas limitée exclusivement aux cas de fouille, de perquisition et de saisie. Par ailleurs, nous ne croyons pas qu'il soit nécessaire d'établir une distinction relativement à ce que le policier est chargé de faire une fois qu'il se trouve devant la personne en possession de la chose recherchée. En fait, l'exercice du pouvoir de perquisition n'implique pas nécessairement que l'agent de la paix pénètre dans les lieux. Dans la grande majorité des perquisitions visées par l'enquête de la Commission et effectuées ailleurs que dans des maisons d'habitation (le plus souvent dans les locaux de compagnies de téléphone, d'établissements financiers et autres lieux occupés à des fins commerciales), la chose recherchée a été «remise sur demande[374]». Il va sans dire que la présence physique de l'agent de la paix incite à la coopération. Il n'en reste pas moins que dans des cas semblables, l'atteinte portée a peu d'importance.

329. Nous estimons que la meilleure solution consiste à adopter des mesures de protection qui soient vraiment en rapport avec le fait que la personne n'est pas soupçonnée d'infraction. Dans certaines décisions canadiennes, on semble avoir exigé des mentions précises dans la dénonciation, avant de permettre la délivrance d'un mandat, ce qui revient à rendre plus rigoureux les critères habituellement applicables à la délivrance du mandat[375]. Néanmoins, nous sommes d'avis que la véritable distinction entre le cas où la personne visée est soupçonnée d'infraction et celui où elle ne l'est pas réside dans le risque de perte des choses ou des renseignements se trouvant en possession de la première, en cas d'inaction de la part de la police. En toute logique, c'est donc au stade de l'exécution, où le choix des méthodes de perquisition prend son importance, qu'il y a lieu d'accorder une protection accrue à la personne qui n'est pas soupçonnée. En outre, puisque c'est à cette étape que la personne visée est vraiment en contact avec la police, un surcroît de protection est plus essentiel qu'au stade de la délivrance du mandat.

330. La législation américaine a récemment reconnu qu'il y avait lieu d'accorder un respect particulier aux personnes qui ne font

l'objet d'aucun soupçon[376]. La loi en question oblige le procureur général des États-Unis à publier des directives, de façon que les policiers aient recours, dans de tels cas, à des méthodes qui empiètent le moins possible sur la vie privée de ces personnes, sans toutefois risquer la perte ou la destruction des choses recherchées. De telles directives devraient être adoptées par les forces de police canadiennes. Par ailleurs, nous estimons que les règles fondamentales devraient être intégrées à la loi.

B. Les comptes bancaires

RECOMMANDATION

39. Lorsqu'il existe des motifs raisonnables de croire que des choses «saisissables» ont été déposées dans un compte bancaire, la police devrait avoir le pouvoir d'obtenir un mandat en vue de transférer le montant des fonds saisissables dans un compte officiel de la police, placé sous le contrôle judiciaire. Lorsque les policiers saisissent des documents comptables dont ils croient raisonnablement qu'ils contiennent des renseignements leur permettant de demander un mandat pour la saisie de fonds se trouvant dans un compte bancaire, ils devraient pouvoir obtenir une ordonnance temporaire gelant la provision de ce compte. L'ordonnance de gel devrait avoir un effet limité dans le temps et sa portée devrait être restreinte à la somme des fonds saisissables. Le pouvoir de rendre une telle ordonnance devrait appartenir à un juge d'une cour supérieure ou à un juge mentionné à l'article 482 du *Code criminel*, et la personne visée par l'ordonnance devrait avoir le droit d'en demander la révocation immédiatement.

331. Nous avons déjà reconnu qu'en principe, les choses «saisissables» devraient être visées par les mécanismes de fouille, de perquisition et de saisie, même si elles ont été converties sous forme de prêt ou de dette et n'ont aucune valeur probante[377]. Cependant, l'application de ce principe soulève un certain nombre de difficultés pratiques, comme la façon dont la «saisie» de fonds doit être effectuée. En outre, quelle solution juridique peut-on apporter au problème comptable d'identification des fonds saisissables parmi toutes les opérations financières qui peuvent avoir été conclues par la personne visée?

332. Dans ce contexte, nous avons défini la «saisie» comme la mise sous main de justice des fonds recherchés. Il est possible, pour

ce faire, d'avoir recours à une ordonnance de gel ou de prohibition, comme celle qui est prévue à l'article 12 de la *Loi sur les pratiques de commerce* de l'Ontario[378]. Cette disposition prévoit que dans le cadre de certaines enquêtes, le Directeur peut, si la chose est souhaitable pour la protection des clients d'une personne faisant l'objet d'une enquête,

> ... enjoindre à toute personne qui a en dépôt ou sous sa garde ou conserve en sûreté un actif ou des fonds quelconques [appartenant à la personne visée par l'enquête] placés en fiducie pour le bénéfice de la personne [visée par l'enquête], de ne pas s'en départir. Il peut ordonner à la personne [visée par l'enquête] de s'abstenir de retirer tout actif ou fonds placé en fiducie des mains de toute personne qui en possède une partie quelconque en dépôt, sous son contrôle ou en sûreté. Il peut ordonner à celle-ci de conserver en fidéicommis cet actif ou ces fonds placés en fiducie qui appartiennent à des clients, à des consommateurs avec qui elle fait affaire ou à d'autres personnes et qui sont en sa possession ou son contrôle pour l'usage de tout séquestre provisoire, gardien, fiduciaire, séquestre ou liquidateur ... ou jusqu'à la date à laquelle le Directeur ou le Tribunal annule sa directive ou consent à libérer des effets de l'ordonnance n'importe quel actif ou fonds en fiducie ....

En 1979, lors de la Conférence sur l'uniformisation des lois, on a recommandé que cette disposition soit reprise et adaptée de façon à viser les fonds obtenus par la perpétration d'une infraction et détenus dans des comptes bancaires. On a toutefois proposé que le pouvoir de rendre l'ordonnance soit confié au juge d'une cour supérieure[379].

333. Par contre, la somme en question pourrait être retirée du compte de la personne et transférée dans un autre compte au nom de la police. En fait, certaines forces de police canadiennes ont déjà eu recours à cette méthode, bien que celle-ci ne soit pas clairement reconnue par la loi actuelle. En vertu des recommandations 2 et 11 cependant, dès lors qu'il est établi que des fonds constituent «le produit d'une infraction» ou des «fonds dont la possession, dans les circonstances de l'espèce, constitue une infraction», la saisie pourrait être autorisée par un mandat, cela ne fait aucun doute. Cette solution a pour avantage de reprendre les mécanismes de protection que comportent habituellement les fouilles, les perquisitions et les saisies avec mandat, et surtout l'exigence de spécificité concernant la description de l'infraction alléguée et des choses saisissables. Ces mécanismes de protection font contraste avec la nature générale et incertaine des liens qu'établissent les dispositions législatives prévoyant des ordonnances de gel, entre l'infraction et les fonds litigieux. Cela est le cas, non seulement de la loi ontarienne précitée,

mais également des mécanismes légaux conçus spécialement pour les crimes économiques. En Colombie-Britannique par exemple, dans le rapport Henderson, on a proposé un régime légal comportant des ordonnances provisoires visant des biens [TRADUCTION] «susceptibles de confiscation» en raison d'une activité criminelle, ou visant les profits résultant d'une activité criminelle[380].

334. L'absence de mécanisme de protection, dans le cas des ordonnances de gel, semble toutefois moins grave dans la mesure où, en vertu de ces ordonnances, la personne visée conserve généralement la possession des biens. Par exemple, une loi américaine sur les "Racketeer Influenced and Corrupt Organizations" permet au tribunal:

> [TRADUCTION]
> de rendre une ordonnance de prohibition, ou de prendre toute autre mesure qu'il juge appropriée, y compris ... l'acceptation d'engagements satisfaisants, relativement à tout bien ou autre droit susceptible de confiscation ...[381].

Toutefois, ce texte laisse sous-entendre que les dispositions de cette nature participent plus des ordonnances telles les injonctions, que des mécanismes de perquisition et de saisie. Cela est d'autant plus vrai que le texte de loi prévoit l'acceptation d'engagements qui s'appliquent à des biens, tels les terrains, qui ne sont habituellement pas visés par les pouvoirs de fouille, de perquisition et de saisie. En outre, la jurisprudence britannique récente a reconnu que l'injonction, plutôt que les perquisitions et les saisies, était le recours approprié pour mettre sous main de justice des fonds obtenus par la perpétration d'une infraction et déposés dans un compte bancaire[382].

335. C'est pourquoi nous restreignons l'application des ordonnances de gel aux cas où celle-ci peut être nécessaire à l'exécution d'un mandat de perquisition. Il est certain que la complexité des opérations commerciales sur lesquelles peut porter l'enquête de la police peut justifier l'existence de ce mécanisme particulier. En effet, dans de tels cas, il est souvent difficile d'identifier les fonds constituant le produit de l'infraction, jusqu'à ce que les dossiers comptables de la personne aient aussi été saisis. Or, comme la personne informée de la saisie imminente de ses dossiers est susceptible de chercher à transférer les fonds litigieux, les policiers qui tentent d'identifier les sommes en cause peuvent se trouver devant un dilemme. Dans ces conditions, le mécanisme de l'ordonnance de gel peut être avantageux pour la police, dans la mesure où il vise la provision bancaire et non des fonds déterminés.

336. Cela étant dit, cet argument ne saurait justifier l'adoption d'un mécanisme comme celui que prévoit la *Loi sur les pratiques de commerce* de l'Ontario. Il montre toutefois l'utilité que peut avoir une ordonnance de gel temporaire en attendant l'identification des fonds. Lorsqu'il obtient un mandat lui permettant de saisir les dossiers comptables d'une personne, l'agent de la paix pourrait également demander une ordonnance de gel temporaire visant le compte bancaire où les fonds en cause ont censément été déposés. Par ailleurs, plutôt que de durer jusqu'à une audition subséquente, l'ordonnance expirerait à la fin d'un délai raisonnable et déterminé. Dans le cas où la police ne serait pas en mesure d'obtenir un mandat de saisie ordinaire à l'expiration du délai, le compte serait débloqué.

337. Il va sans dire que le mécanisme d'ordonnance de gel provisoire constitue une dérogation aux normes qui caractérisent les règles habituelles du mandat. Il doit en conséquence comporter des garanties appropriées. Premièrement, la durée de l'ordonnance devrait être la plus courte possible, compte tenu des besoins de l'enquête. La fixation d'un délai par voie législative, comme dans le cas de l'exécution du mandat, est forcément arbitraire. Toutefois, après avoir discuté avec les représentants des forces de police, il semble qu'une période de trente jours, avec possibilité de renouvellement, soit appropriée. Deuxièmement, le montant des fonds visés par l'ordonnance ne devrait en aucun cas excéder la somme liée à l'infraction. Troisièmement, étant donné, d'une part, le caractère complexe et aléatoire de l'identification des fonds par la police à ce stade préliminaire et, d'autre part, le soin particulier qui doit être apporté, sur le plan judiciaire, à l'examen de la demande et à l'exercice du pouvoir discrétionnaire, il est opportun, selon nous, que la tâche de rendre une ordonnance de gel soit confiée au juge d'une cour supérieure ou au juge visé par les dispositions de l'article 482 du *Code criminel*. Enfin, comme dans le cas de la loi ontarienne, la personne visée par l'ordonnance devrait avoir le droit d'en demander immédiatement l'annulation au tribunal.

338. Notre recommandation a une portée limitée dans la mesure où elle ne vise que les fonds déposés dans des comptes bancaires. Certes, il serait possible d'appliquer le mécanisme d'ordonnance de gel provisoire aux valeurs mobilières et aux effets de commerce. Cependant, nous ne croyons pas que cela soit utile à l'exercice des pouvoirs de fouille, de perquisition et de saisie. En effet, la saisie de tels biens par la police, c'est-à-dire la mise sous main de justice ou la prise de possession de ceux-ci, soulèverait des difficultés liées à l'administration et au transfert, difficultés qui ne se

posent pas avec autant d'acuité dans le cas des fonds. Nous sommes d'avis que dans le cas de tels biens, comme dans celui des immeubles, la question fondamentale reste celle de la nécessité d'ordonnances de prohibition à long terme comme celles que prévoyait le rapport Henderson. Avec toute sa complexité et son importance, cette question déborde le cadre du présent document de travail.

C. Le secret professionnel de l'avocat

RECOMMANDATION

40. Il convient d'adopter les règles prévues au Projet de loi C-21, présenté en 1978, portant sur la mise sous scellé des documents à caractère confidentiel. Deux nouvelles dispositions devraient cependant être ajoutées. En premier lieu, la protection du secret devrait s'étendre aussi bien aux documents en possession du client qu'à ceux qui sont en possession de l'avocat. En second lieu, il devrait être prévu expressément que le requérant et le procureur de la Couronne ont tous deux accès aux documents qui font l'objet de la demande.

339. La *Loi de 1978 modifiant le droit pénal* prévoyait l'adjonction de l'article 444.1 au *Code criminel*[383]. Cette disposition établissait des règles particulières concernant la saisie de documents se trouvant en possession d'un avocat. Suivant ces règles, si ce dernier invoquait la confidentialité des documents saisis, le fonctionnaire effectuant la saisie devait placer les documents dans un colis scellé sans les examiner ni en faire de copie. Une fois le colis confié à un gardien acceptable, l'avocat ou son client disposaient d'un délai de quatorze jours pour s'adresser à un juge qui, lors de l'audition, devait examiner les documents et statuer sommairement sur le bien-fondé de la demande. Dans les cas où les documents auraient été visés par le secret, le juge aurait ordonné au gardien de les remettre aux demandeurs, et ils seraient alors devenus irrecevables en preuve sauf renonciation subséquente. Dans le cas contraire, les documents devaient être remis à la police ou au ministère public.

340. L'adoption de ces dispositions mettrait un terme à la controverse que l'on retrouve dans la jurisprudence récente portant sur les cas d'application du secret professionnel de l'avocat. Au moment de mettre sous presse, cette question était pendante devant

la Cour suprême du Canada dans l'affaire *Descôteaux v. Mierzwinski*[384]. En attendant cette décision, suivant la position restrictive adoptée dans les affaires *Colvin* et *Ex parte Merrick*[385], le secret professionnel relève des règles de preuve et en conséquence, ne peut être soulevé qu'au procès. En revanche, selon la position plus large, le secret professionnel pourrait être invoqué au stade de l'enquête. Traitant des pouvoirs de saisie aux termes de la *Loi relative aux enquêtes sur les coalitions*[386], le juge en chef Jackett a fait le commentaire suivant dans l'affaire *Re Director of Investigation and Research and Shell Canada Ltd.*:

> Il suffit de dire, sur cette question, qu'il est reconnu depuis très longtemps que la protection civile et criminelle, que nos principes de droit accordent à l'individu est subordonnée à l'assistance et aux conseils que l'individu reçoit d'hommes de loi sans aucune crainte que la divulgation pleine et entière de ses actes et pensées à son conseiller juridique puisse de quelque façon être connue des tiers de manière à être utilisée contre lui[387].

Nous souscrivons à l'opinion du juge en chef Jackett, et nous sommes d'avis que l'adoption de l'article 444.1 serait un pas dans la bonne direction. Toutefois, nous nous devons de signaler deux faiblesses de la loi de 1978.

341. En premier lieu, seuls les documents qui se trouvent en possession de l'avocat peuvent être visés par le secret professionnel. La Commission de réforme du droit du Manitoba a relevé cette lacune dans le cas de dispositions semblables de la *Loi de l'impôt sur le revenu*[388]:

> [TRADUCTION]
> Comme cela se produit souvent, cependant, les documents en possession du client, du comptable de celui-ci ou d'une autre personne, peuvent aussi être visés par le secret professionel de l'avocat .... Ainsi, alors que des documents confidentiels en possession d'un avocat peuvent être enlevés à celui-ci, il semble que les fonctionnaires du ministère ne pourraient jamais avoir accès aux mêmes documents si ceux-ci se trouvaient entre les mains du client et ce, en vertu de la théorie du secret professionnel suivant le common law. Cette interprétation montre clairement que tout mécanisme permettant d'invoquer le secret professionnel de l'avocat doit être général et s'appliquer à tous les documents, peu importe l'endroit où ils se trouvent[389].

Nous nous rallions à cette position.

342. En second lieu, les règles prévues ne reconnaissent pas aux avocats des parties le droit de consulter les documents avant de

présenter leurs arguments au juge. Bien que ce dernier ait le devoir explicite d'examiner les documents, aucune disposition de la loi de 1978 ne permet aux représentants des parties d'en faire autant. Si l'on peut supposer que le représentant de l'avocat connait la nature des documents, il en va tout autrement du procureur de la Couronne. De fait, le premier peut lui aussi avoir intérêt à examiner le colis scellé afin de préparer sa cause. Il parait donc opportun que la loi permette aux représentants des deux parties d'avoir accès aux documents, mais à certaines conditions. Il convient en effet de s'assurer que le procureur de la Couronne ne pourra ensuite tirer profit de la consultation des documents, au cas où le juge déciderait que les documents sont visés par le secret professionnel. Deux mesures semblent appropriées: en premier lieu, le procureur de la Couronne qui a agi lors de l'audition de la demande ne devrait pas être admis à participer davantage à l'enquête ni à la poursuite. En second lieu, il devrait être tenu de ne pas divulguer le contenu du colis scellé.

D. Les perquisitions dans les locaux de la presse et des autres media

RECOMMANDATION

41. La presse ne devrait bénéficier, à l'encontre des fouilles, des perquisitions et des saisies abusives, d'aucune mesure de protection particulière en dehors de celles qui sont prévues par la *Charte* et par les présentes recommandations.

343. Parmi les libertés fondamentales existantes, la *Charte canadienne des droits et libertés* reconnait «la liberté de presse et des autres moyens de communication[380]». Doit-on y voir un mécanisme de protection particulier contre l'exercice, par la police, de ses pouvoirs de fouille, de perquisition et de saisie? Les tribunaux canadiens et américains ont récemment abordé cette question par le biais d'aspects particuliers. La jurisprudence semble n'accorder aucune protection additionnelle aux organismes de presse lorsqu'ils sont eux-mêmes soupçonnés d'infraction. La question controversée est plutôt celle de savoir si l'organisme qui n'est pas soupçonné d'infraction mais qui détient des choses ou des renseignements pertinents peut faire l'objet d'une perquisition. Par exemple, un reporter ou un photographe peut avoir enregistré des faits de nature

prétendument criminelle. Dans ce cas, la police devrait-elle avoir le droit d'obtenir, de la manière habituelle, un mandat de perquisition visant ces documents afin de les saisir?

344. On trouve une étude complète de cette question dans les diverses décisions rendues dans l'affaire *Zurcher* v. *Stanford Daily*. Finalement, la Cour suprême des États-Unis a jugé qu'un mandat autorisant des perquisitions dans les locaux d'un journal universitaire était valide sur le plan constitutionnel[191]. Selon les juges de la minorité, cependant, l'exercice des pouvoirs de perquisition dans de tels cas permettait à la police d'avoir accès, au hasard, à des dossiers qui n'avaient aucun rapport avec l'enquête, et pouvait entraîner la divulgation injustifiée de sources confidentielles. Cet argument n'a pas été retenu par les juges de la majorité qui se sont appuyés sur la jurisprudence suivant laquelle [TRADUCTION] «les tribunaux doivent appliquer les exigences relatives au mandat avec une rigueur exceptionnelle» lorsque la liberté de la presse est en jeu. Comme en l'espèce, le mandat était conforme à ces exigences, il a été jugé valide. Cependant, à la suite de cette décision, des dispositions législatives ont été adoptées de façon à restreindre les pouvoirs de fouille, de perquisition et de saisie dans le cas de documents se trouvant en possession de journalistes[192].

345. En revanche, dans l'affaire *Pacific Press*, la Cour suprême de la Colombie-Britannique a manifesté le même souci d'appliquer les garanties générales avec une rigueur particulière, pour en arriver au résultat inverse: le mandat a été jugé invalide parce que les motifs présentés au juge de paix étaient insuffisants. Après avoir passé en revue les autorités britanniques et américaines, le juge Nemetz, juge en chef de la Colombie-Britannique, a déclaré ce qui suit:

> [TRADUCTION]
> Quel est donc l'état du droit positif canadien sur cette question? L'avocat de la requérante prétend que le Parlement a réservé un statut particulier à la presse dans la *Déclaration canadienne des droits*. Par conséquent, selon lui, le juge de paix doit prendre en considération les dispositions de l'alinéa 1*f*) et de l'article 2 avant d'exercer son pouvoir discrétionnaire et de délivrer un mandat de perquisition contre un organisme faisant partie de la presse du pays. Il faut, à plus forte raison, en tenir compte lorsque le journal n'est pas soupçonné d'avoir participé à l'infraction. Je souscris à cet argument[193].

346. En réalité, cette situation n'illustre qu'un aspect du problème que soulèvent les perquisitions dans le cas des personnes qui ne sont pas soupçonnées d'infraction. Comme nous l'avons vu précédemment, ces personnes doivent bénéficier de certaines

mesures de protection et ce, au stade de l'exécution du mandat plutôt qu'à celui de la délivrance[194]. Cela étant dit, on a reconnu, dans certaines décisions, que le journaliste joue dans la société un rôle particulier, de sorte qu'il ne peut être traité comme toute autre personne ne faisant l'objet d'aucun soupçon[195]. En Grande-Bretagne par exemple, le critère applicable, lorsqu'il s'agit de déterminer si l'on doit forcer un journaliste à produire en preuve un film qu'il a réalisé, est beaucoup plus rigoureux que celui de la simple «pertinence». Le film doit plutôt avoir un lien direct et important avec la solution des questions dont le tribunal est saisi[196].

347. En droit canadien, la position des tribunaux est ambiguë au sujet de la protection des journalistes. Les décisions les plus importantes sur cette question concernent le pouvoir du tribunal de forcer un reporter à divulguer ses sources lors d'un interrogatoire préalable en matière civile. Dans l'affaire *Reid* v. *Telegram Publishing Co Ltd.*, la Haute Cour de l'Ontario a décidé que le reporter ne pouvait y être contraint[197]. En revanche, la Cour d'appel de la Colombie-Britannique a adopté la position contraire dans l'affaire *McComachy* v. *Times Publishers Ltd.*[198]. Ces décisions n'ont qu'un intérêt indirect en ce qui a trait aux fouilles, aux perquisitions et aux saisies. Pourtant, il importe de signaler que dans l'affaire *Pacific Press*, la Cour suprême de la Colombie-Britannique n'a pas fait mention de l'affaire *McComachy*, se ralliant plutôt à la position britannique et américaine en faveur de la protection des privilèges de la presse.

348. Il convient de préciser que lorsque l'État tente d'obtenir des renseignements d'un organisme de presse qui manifeste des réticences, le tribunal chargé de trancher la question doit concilier des intérêts antagoniques très importants. Nous estimons que l'équilibre peut être réalisé si l'on accorde à la presse la même protection qu'aux autres personnes sur lesquelles ne pèse aucun soupçon. Aux termes de la recommandation 38, les policiers seraient tenus, avant d'entreprendre la perquisition, de demander la production des choses saisissables. Ce n'est qu'en cas de refus ou lorsqu'il existe des motifs raisonnables de croire que le délai nécessaire à une telle demande risque d'entrainer la perte ou la destruction de choses saisissables, que les policiers seraient autorisés à exécuter leur mandat de la façon habituelle. Cette règle, jointe à la «rigueur exceptionnelle» dont feront censément preuve les juges de paix et les tribunaux chargés de la révision, devrait protéger de façon appropriée la presse et les autres media de communication contre les fouilles, les perquisitions et les saisies abusives.

II. L'entrée clandestine

RECOMMANDATION

42. La modification des règles relatives aux fouilles, aux perquisitions et aux saisies, afin de permettre les activités clandestines de la police constituerait une atteinte grave aux mécanismes de protection que ces règles comportent. En l'absence de preuve établissant de façon convaincante la nécessité de tels sacrifices, les règles de procédure relatives aux enquêtes en matière criminelle ou en matière connexe ne devraient pas être modifiées.

349. Au cours des dernières années, la question du pouvoir de la police de s'introduire clandestinement dans les lieux privés a été portée à l'attention du public à la suite d'un certain nombre d'enquêtes sur les activités de la police au Canada. Les résultats de ces enquêtes figurent notamment dans le Rapport Keable, qui traitait de certains incidents impliquant des forces policières fédérales, provinciales et municipales au Québec[399], et dans le Rapport McDonald qui portait plus précisément sur les activités de la G.R.C.[400]. Les auteurs de ces deux rapports ont recommandé que la Commission de réforme du droit du Canada s'attaque à certaines questions importantes concernant les pouvoirs de la police[401]. Conscients de l'importance de la question des fouilles, des perquisitions et des saisies clandestines en matière criminelle, nous avons abordé ce problème en deux étapes. Dans un premier temps, après avoir examiné la législation et les règles du common law, nous en venons à la conclusion qu'à une exception près, du reste fort discutable, à l'heure actuelle, ces activités ne sont pas autorisées par la loi. Dans un second temps, après avoir pesé les avantages et les inconvénients que comportent de telles activités, nous sommes d'avis que la codification de ces pouvoirs n'est pas justifiée dans l'intérêt de l'application du droit pénal.

A. Le droit actuel

350. Par entrée clandestine, nous entendons principalement ce que les représentants des forces de police appellent fréquemment des «investigations exploratoires». Elles visent à recueillir des renseignements de l'endroit où a lieu la perquisition, à l'insu de la personne

visée par l'enquête. Le succès de cette démarche, comme dans le cas de l'interception de communications en vertu de l'article 178.1 du *Code criminel*, dépend, dans une large mesure, de la clandestinité de l'entrée. Par ailleurs, il existe aussi des types d'activités où c'est le rôle de la police qui est gardé secret et non l'acte lui-même. L'«Opération Bricole», dont traitait le Rapport Keable, en est un bon exemple. L'un des buts avoués de cette opération policière clandestine était d'éveiller les soupçons de l'organisation criminelle visée par la perquisition et de lui faire croire que l'introduction, dont on avait laissé des traces évidentes, était imputable à une organisation rivale[402].

351. Même au sein des forces de police, les opinions sur la légalité de telles activités sont partagées. Le caractère illégal de l'«Opération Bricole» avait même été admis dans les documents internes de la police[403]. En revanche, les renseignements présentés par la G.R.C. à la Commission McDonald révèlent que les membres d'un certain nombre de divisions se sont livrés à des «investigations exploratoires», croyant que de telles opérations étaient valides[404]. Toutefois, au cours des audiences de la Commission, la G.R.C. a reconnu que sur ce point, la loi était loin d'être claire[405]. Pour sa part, la Commission McDonald en est venue à la conclusion que les entrées clandestines étaient illégales sauf peut-être dans le cas de perquisitions effectuées en vertu de la législation relative aux drogues et aux stupéfiants. Bien que cette position ait été mise en doute dans un mémoire publié par le ministère de la Justice[406], de façon générale, nous souscrivons aux conclusions de la Commission McDonald sur ce point.

352. Suivant le raisonnement de la Commission McDonald, étant donné le caractère attentatoire de ce genre d'activités, celles-ci ne pouvaient être légales que dans la mesure où elles étaient autorisées par la législation ou le common law. D'après nos propres recherches, il n'existe aucune décision canadienne publiée où l'on ait reconnu l'existence d'un pouvoir de common law permettant de s'introduire subrepticement dans un lieu et d'y effectuer une perquisition. Du reste, certaines remarques qu'a faites le juge McRuer dans l'affaire *Bell Telephone*, où l'on a annulé un mandat de perquisition permettant l'introduction dans un endroit et l'interception de communications téléphoniques, semblent plutôt attester l'inexistence d'un tel pouvoir:

> [TRADUCTION]
> Comme aucune règle de common law ne permet ce que l'on a cherché à faire en l'espèce, ce pouvoir doit provenir de la législation applicable[407].

Ceux qui soutiennent l'existence d'un pouvoir de common law autorisant l'entrée clandestine s'appuient surtout sur la possibilité d'une évolution *éventuelle* du common law, de façon à autoriser l'exercice d'un tel pouvoir. Bien qu'il repose sur certaines décisions canadiennes et britanniques importantes concernant les pouvoirs de la police[408], cet argument a peu de poids, eu égard à certains jugements canadiens récents portant directement sur le pouvoir en cause.

353. La décision rendue par la Cour suprême du Canada dans l'affaire *Colet*[409] est sans doute la plus importante sur ce point. En l'espèce, la Cour a jugé que le pouvoir prévu par la loi de saisir des armes à feu ne comportait pas le droit de pénétrer et de perquisitionner dans les lieux privés. Il est assez délicat d'établir un parallèle entre la question qui nous occupe et cette affaire puisqu'en l'espèce, l'activité postérieure à l'entrée (la saisie d'armes à feu) était autorisée par le *Code criminel*, alors que la fouille clandestine n'est reconnue par aucune loi fédérale. Il est néanmoins possible de conclure qu'*a fortiori*, si le pouvoir d'entrer n'existe pas relativement à une activité sanctionnée par la loi, il ne saurait exister pour celle qui *ne l'est pas*.

354. L'entrée clandestine en vue de faire de l'écoute électronique en vertu des dispositions de l'article 178.1 du *Code* pose un problème analogue. Dans l'affaire *Dass*, on a signalé qu'il n'existait aucun pouvoir permettant aux policiers de s'introduire dans un lieu afin de se livrer à de telles activités:

> [TRADUCTION]
> Le procureur de la Couronne soutient que le pouvoir d'installer le dispositif comporte implicitement le pouvoir de pénétrer par la force ou à la dérobée .... Or, je ne vois rien dans le *Code criminel* qui donne aux juges le pouvoir d'autoriser ou d'excuser une entrée illégale. Le procureur de la Couronne fait référence aux dispositions de l'alinéa 178.13(2)*d*), qui permettent au juge d'imposer les modalités qu'il estime opportunes dans l'intérêt du public. À mon avis, cette disposition n'a pas été adoptée en vue de permettre aux tribunaux d'avaliser des actes illégaux[410].

Pourtant, la Cour suprême des États-Unis a exprimé l'opinion contraire dans l'affaire *Dalia*, en décidant qu'il était légal de s'introduire subrepticement dans un lieu afin d'installer un dispositif d'écoute. Suivant le raisonnement de la majorité de la Cour, ce pouvoir d'entrer était nécessaire à l'application des dispositions de la législation en cause en matière d'écoute électronique[411].

355. Nous en concluons qu'au Canada, on ne saurait invoquer le common law pour permettre les entrées clandestines visant à recueillir des renseignements. Par conséquent, la source de ce pouvoir doit obligatoirement se trouver dans la législation. Or, les seules dispositions dont il soit possible de tirer un tel pouvoir dans le cas des fouilles, des perquisitions et des saisies en matière criminelle sont celles de l'alinéa 10(1)c) de la *Loi sur les stupéfiants* et celles de l'alinéa 37(1)c) de la *Loi des aliments et drogues*. Celles-ci prévoient que l'agent de la paix «peut ... saisir et enlever» des stupéfiants, des drogues, ainsi que toute autre chose se trouvant dans le lieu où une perquisition est effectuée en vertu des dispositions de la loi applicable.

356. Le libellé des dispositions établissant ces pouvoirs de perquisition (que ce soit en vertu d'un mandat de main-forte, d'un mandat de perquisition ou, lorsqu'il ne s'agit pas d'une maison d'habitation, sans mandat) paraît donner à l'agent de la paix le pouvoir discrétionnaire de saisir certains objets. En effet, l'agent ne semble pas *tenu* de saisir ces objets même s'il les trouve. À cet égard, ces dispositions font contraste avec les mandats établis suivant la formule 5 du *Code criminel*, aux termes de laquelle l'agent de la paix est «obligé» de pénétrer dans les lieux, de rechercher les choses mentionnées et de les apporter au juge de paix. Quoi qu'il en soit, d'aucuns prétendent que les dispositions précitées en matière de drogues et de stupéfiants permettent les entrées clandestines dans la mesure où l'agent de la paix peut pénétrer dans le lieu qui fait l'objet de l'enquête, tenter de trouver des preuves d'activité illégale, enregistrer ces preuves ou en prendre des échantillons et cela, sans laisser de traces. Pourtant, les dispositions qui traitent du mandat de main-forte et du mandat de perquisition prévoient que ces documents doivent être utilisés afin de rechercher des stupéfiants. En conséquence, lorsque la démarche de l'agent de la paix a pour but de recueillir des renseignements relatifs à des stupéfiants, plutôt que de rechercher les stupéfiants eux-mêmes, on pourrait prétendre que la fouille est illégale au regard des dispositions en cause. Par ailleurs, la définition du rapport qui existe entre les perquisitions clandestines et les exigences actuelles concernant l'avis préalable à l'entrée n'est pas sans poser de difficultés[412].

357. Quoi qu'il en soit, si tant est qu'il existe un pouvoir d'entrée clandestine en matière de stupéfiants et de drogues, sa portée demeure relativement limitée. Or, le pouvoir revendiqué par la G.R.C. est beaucoup plus large: il s'agit, non pas d'un pouvoir pouvant être exercé du fait de l'existence de «motifs raisonnables»,

mais bien du pouvoir de pénétrer dans un lieu afin «d'établir avec certitude» s'il s'y trouve des preuves ou des biens provenant de la perpétration d'une infraction[413]. Étant donné l'importance de cette demande et la difficulté de déterminer quelles sont les activités permises par la loi actuelle, il est essentiel que cette question soit tirée au clair. Si l'entrée clandestine n'est pas justifiable, cette pratique devrait être interdite par la loi. En revanche, si l'on décidait d'établir un tel pouvoir, il devrait être défini avec soin et précision dans la loi.

B. Les entrées clandestines devraient-elles être autorisées?

358. L'adoption éventuelle de règles de droit concernant les entrées clandestines soulève en fait deux questions. En premier lieu, *comment* devrait-on autoriser de telles entrées dans le cadre d'enquêtes criminelles? En second lieu, les entrées clandestines *devraient-elles* être autorisées dans ce contexte? Nous croyons qu'il est important de traiter ces questions dans l'ordre proposé, puisque la détermination de la nature du mécanisme d'autorisation approprié contribue à définir le contexte nécessaire à la solution de la seconde question.

(1) *Les différents modes d'autorisation possibles*

359. La Commission McDonald n'a pas répondu directement à ces questions. Elle a toutefois proposé un régime d'autorisation des entrées clandestines et d'autres types d'opérations semblables dans le contexte de l'obtention de renseignements en matière de sécurité. Le mode d'autorisation que comporte ce régime est semblable à celui qui est prévu à l'article 178.1 du *Code criminel*[414]. Certaines remarques que contient le rapport laissent entendre que le mécanisme est plus approprié, pour autoriser les entrées clandestines dans le cadre d'enquêtes criminelles, que les dispositions relatives au mandat de perquisition ordinaire. Plus précisément, le rapport énonce que les juges de paix, même ceux qui n'ont aucun lien avec la G.R.C., n'auraient pas les compétences nécessaires pour délivrer les «mandats» autorisant de telles entrées en matière de sécurité. C'est pourquoi la Commission a recommandé que les «mandats» visant l'obtention de renseignements en matière de sécurité soient délivrés par les juges de la Cour fédérale[415]. Il est difficile de savoir, à la

lecture des recommandations de la Commission, si le juge ne doit autoriser qu'une seule entrée par demande. Cependant, certaines caractéristiques du mécanisme, comme la période maximale de 180 jours pendant laquelle l'autorisation peut rester en vigueur, semblent indiquer que le «mandat» pourrait être utilisé plus d'une fois[416]. Nous sommes d'avis que cette perspective n'a rien de rassurant.

360. Chaque entrée clandestine comporte une atteinte distincte à la vie privée. En ce sens, elle se distingue de l'écoute électronique où l'atteinte (l'interception des communications) présente un caractère continu. Une fois cette distinction établie, il est difficile de concevoir la nécessité d'un pouvoir permettant d'entrer plusieurs fois en vertu d'une même autorisation. Un tel pouvoir discrétionnaire irait manifestement à l'encontre du caractère «spécifique» du mécanisme du mandat de perquisition traditionnel[417]. De fait, étant donné que l'«investigation exploratoire» constitue de toute évidence un type de perquisition, il est permis de se demander pourquoi il faudrait *a priori* faire appel à des modes particuliers d'autorisation, que ceux-ci comportent ou non la délivrance d'un «mandat». Nous sommes d'avis qu'il y aurait lieu d'entamer la discussion à partir des règles relatives au mandat de perquisition traditionnel.

361. En attribuant ce pouvoir aux juges de la Cour fédérale, la Commission McDonald a en fait contourné la question. En principe, rien n'empêche que la responsabilité soit confiée aux juges d'un tribunal supérieur pour les cas où des dérogations aux règles normales du mandat seraient jugées nécessaires. Mais encore faudrait-il déterminer quelles sont les dérogations nécessaires. Le Rapport McDonald contient un certain nombre de commentaires montrant que le mandat de perquisition n'est pas le mécanisme approprié dans le cas des entrées clandestines en matière de sécurité. Ces commentaires ont principalement trait aux limites qui caractérisent le mandat traditionnel: (1) au stade où la police désire s'introduire clandestinement dans les lieux, il est possible qu'aucune infraction précise ne puisse être reprochée; (2) de simples «soupçons» ne peuvent donner lieu à la délivrance d'un mandat de perquisition; et (3) le mécanisme du mandat n'est pas assez «discret»[418]. Ces arguments méritent d'être approfondis.

362. C'est dans l'optique des opérations relatives à la sécurité que le Rapport fait état du problème de l'absence d'infraction précise qui puisse être reprochée lors de l'entrée, et il semble que ce problème soit limité à ce contexte particulier. Par ailleurs, les cas mentionnés dans le Rapport, dans lesquels on pourrait avoir recours à l'entrée clandestine dans le cadre d'enquêtes criminelles, semblent

liés à des infractions particulières: la fabrication de drogues ou de stupéfiants et les crimes économiques. Selon nous, il est extrêmement important que les enquêtes criminelles à caractère attentatoire soient liées à la perpétration d'infractions précises. Cette règle découle directement du principe suivant lequel l'application du droit pénal doit avoir un caractère «réactif»[419]. Il n'existe en droit pénal aucun autre pouvoir qui permette à son détenteur de s'introduire chez une personne à moins qu'une infraction précise ne puisse être reprochée à cette dernière. En fait, même les recommandations contenues dans le Rapport McDonald n'avaient pas pour effet de supprimer cette exigence relativement aux pouvoirs exceptionnels qu'elles établissaient aux fins des enquêtes criminelles. Quant à nous, nous ne pouvons admettre une telle dérogation aux exigences du mandat de perquisition à cet égard.

363. Pour ce qui est des motifs justifiant l'autorisation, est fondamentale la règle voulant que le mandat de perquisition ne puisse être fondé sur de simples «soupçons». De fait, c'est justement la crainte de voir des mandats délivrés sur une base aussi faible qui a incité les premiers défenseurs du common law, tel Coke, à refuser de reconnaître le mandat de perquisition. Si cette résistance a pu être vaincue, c'est moyennant l'assurance que les mandats seraient délivrés seulement lorsqu'il existe une «cause plausible»[420]. De nos jours, ce critère est devenu celui des «motifs raisonnables», qui caractérise toutes les dispositions législatives canadiennes concernant le mandat en matière criminelle. Il semble donc juste de dire que dans la mesure où les règles de procédure pénale permettraient d'autoriser des perquisitions fondées sur des demandes ne satisfaisant pas à ce critère, elles iraient à l'encontre de l'un des éléments fondamentaux du mécanisme du mandat.

364. Reste à savoir pourquoi l'application du critère des «motifs raisonnables» est impossible dans le cas des entrées clandestines. Le Rapport McDonald contient le commentaire suivant:

> Ces entrées étaient considérées comme étant justifiées lorsqu'elles avaient pour objet d'obtenir des renseignements ou de confirmer des soupçons selon lesquels une infraction était en cours de préparation ou d'exécution, ou sur le point d'être commise, même si un mandat de perquisition ne pouvait être obtenu parce que les motifs raisonnables et probables qu'exige l'article 443 du *Code criminel* n'existaient pas. En outre, on a eu recours à l'entrée subreptice sans mandat même lorsqu'il aurait été possible d'obtenir un mandat de perquisition, parce que la police voulait s'assurer, avant de procéder à une entrée et à une saisie en bonne et due forme en vertu d'un mandat de perquisition, que

l'activité sous surveillance avait atteint une étape où les preuves trouvées au moment de la perquisition permettraient d'obtenir une condamnation[421].

Parmi ces deux types de situations, il semble que dans le second, où «il aurait été possible d'obtenir un mandat», il soit possible de satisfaire au critère des «motifs raisonnables». C'est le premier cas, où il s'agissait de confirmer des soupçons, qui constitue la plus importante dérogation aux garanties traditionnelles du mandat.

365. Il convient de signaler, cependant, que ce texte traite du mandat prévu à l'article 443 du *Code criminel*, lequel n'autorise que la saisie de «choses». Si, comme nous l'avons recommandé précédemment dans ce document, les pouvoirs de fouille et de perquisition devaient désormais s'appliquer aux «renseignements», il deviendrait possible d'obtenir un mandat dans le premier type de situation[422]. Mais, encore faudrait-il qu'il existe des «motifs raisonnables» de croire que la perpétration d'une infraction déterminée a été amorcée, et que des renseignements particuliers, susceptibles de fournir des éléments de preuve relativement à cette infraction, puissent se trouver sur les lieux. Encore une fois, nous hésitons à autoriser les entrées clandestines en l'absence de tels motifs. En effet, le fait de permettre à la police de s'introduire afin de vérifier l'existence même des motifs raisonnables rendrait illusoire les mécanismes de protection contre les atteintes injustifiées.

366. Et même dans l'hypothèse où les exigences assurant la validité du mandat de perquisition auraient été remplies, il reste à savoir si le recours au mandat est opportun, étant donné le caractère ostensible que celui-ci doit avoir. D'une part, l'accès aux documents relatifs à la demande est une question importante, surtout eu égard à la décision de la Cour suprême du Canada dans l'affaire *MacIntyre*[423]. D'autre part, les problèmes de clandestinité visent également l'exécution des fouilles et des perquisitions. Dans le présent document de travail, nous avons formulé des recommandations portant sur l'avis préalable à l'entrée, et sur l'obligation de fournir certains documents à la personne visée et de permettre à l'occupant d'un lieu d'assister à la perquisition[424]. Il va sans dire que ces règles devraient être modifiées, afin que les entrées clandestines aient un minimum d'efficacité dans le cadre du mécanisme du mandat de perquisition. Il est certain que de telles modifications entraveraient grandement les mécanismes de protection que comportent les règles relatives au mandat. Toutefois, les garanties qu'elles comportent à l'encontre des fouilles et des perquisitions abusives seraient encore préférables aux activités de surveillance, ne serait-ce que parce que la

portée de l'acte autorisé est plus limitée. En définitive, il s'agit donc de déterminer si de telles modifications devraient être intégrées à la législation pénale.

(2) *Conclusion*

367. La plupart des arguments qui militent en faveur de l'adoption de dispositions particulières permettant les entrées clandestines sont ceux qui ont été présentés par la police. Bien qu'elle se soit abstenue de formuler des recommandations à cet égard, la Commission McDonald a néanmoins fait les observations suivantes:

> Dans un mémoire à la commission sur les entrées subreptices, la G.R.C. a soutenu vigoureusement qu'il s'agit là d'une technique d'enquête souhaitable et souvent essentielle lorsque la fabrication de drogues illicites et d'alcool fait l'objet d'inquisitions de la part d'enquêteurs ingénieux. Vient un point où des agents qui ont poursuivi des enquêtes longues, difficiles et souvent dangereuses sont obligés d'établir avec certitude l'emplacement d'un laboratoire de drogues illicites ou d'un alambic, et de déterminer si le laboratoire ou l'alambic est en production ou à l'étape de la mise en place, si des drogues ou de l'alcool sont cachés à un endroit donné, ou si diverses quantités de drogues ou d'alcool illicites sont retirées de temps à autre d'une cachette à des fins de trafic clandestin. La Gendarmerie considère qu'il est extrêmement difficile, en l'absence du pouvoir de perquisitionner dans des circonstances où l'obtention d'un mandat de perquisition est actuellement impossible, de déceler l'existence de laboratoires de drogues clandestins. La G.R.C. estime aussi que l'entrée subreptice est fort utile, de façon générale, dans la lutte contre le crime dit «économique». Cette dernière affirmation n'a toutefois pas été étayée à nos audiences[425].

368. Au regard des données expérimentales dont nous disposons, il est difficile de déterminer le bien-fondé des revendications de la police concernant l'utilité des «investigations exploratoires». Pour des raisons que l'on peut comprendre sans peine, les agents de la G.R.C. éprouvent parfois des réticences à divulguer des renseignements susceptibles de compromettre le succès de leurs enquêtes. Pourtant, il ressort clairement de déclarations publiques faites par les représentants de cette force que le recours à cette pratique varie considérablement d'une division à l'autre. En fait, dans le cadre de l'enquête menée par la Commission McDonald, la G.R.C. a elle-même éprouvé certaines difficultés à déterminer la mesure dans laquelle on avait recours aux «entrées

clandestines» en pratique[426]. La plupart des exemples concrets cités dans le Rapport donnent peu d'indications concernant la gravité des infractions en cause ou l'existence d'autres méthodes possibles. Au sein de la division «K» en Alberta, il semble que la méthode de l'entrée clandestine ait été utilisée surtout dans le cas d'infractions relatives à des biens volés[427], c'est-à-dire en dehors des contextes des drogues, de l'alcool et des crimes économiques, contextes cités par la G.R.C. pour justifier la nécessité de cette méthode.

369. Ces remarques mettent en lumière l'un des risques graves que comportent les entrées clandestines: les problèmes qui surgissent relativement à l'obligation de rendre compte lorsque les pouvoirs de fouille et de perquisition perdent leur caractère ostensible. Le même problème s'est posé dans le contexte de l'écoute électronique prévue aux articles 178.1 et suivants du *Code criminel*, qui contiennent des dispositions obligeant le Solliciteur général à faire rapport des activités d'écoute électronique. Ces dispositions ont été adoptées expressément en vue de permettre au Parlement d'exercer un certain contrôle sur l'interception des communications[428]. Si l'on en juge par le nombre de condamnations obtenues, facteur important dans la détermination du succès ou de l'utilité des interceptions, les recherches de la Commission montrent qu'essentiellement, les résultats sont peu significatifs. Dans une large mesure, cet état de choses a été imputé à la lenteur du processus judiciaire, et aux ambiguïtés qui résultent de l'application de l'obligation de faire rapport aux faits complexes des enquêtes[429].

370. En dehors de ces questions d'ordre général, le pouvoir d'entrer clandestinement bat en brèche certains aspects particuliers de l'obligation de rendre compte. Encore une fois, le caractère clandestin accordé par la législation à l'écoute électronique nous servira d'exemple. Il peut s'écouler entre quatre-vingt-dix jours et trois ans avant qu'une personne soit avisée que ses communications ont été interceptées[430]. Même si la preuve obtenue par l'interception des communications est produite devant le tribunal, il est impossible d'avoir accès aux documents relatifs à l'obtention de l'autorisation, sauf dans les cas manifestes de fraude ou de non-divulgation volontaire[431]. En conséquence, l'obligation de rendre compte n'existe plus, à toutes fins utiles, qu'envers le juge qui autorise le processus, et qu'envers les responsables du ministère public et de la police qui en surveillent l'exécution. Or, si l'on permettait que les règles de droit régissant les fouilles, les perquisitions et les saisies prennent une telle orientation, cela reviendrait à saper une caractéristique fondamentale de ces pouvoirs, caractéristique que l'on a associée à

ceux-ci depuis leur instauration il y a trois cents ans: leur caractère ostensible à l'égard des personnes concernées.

371. Certaines des recommandations que contient le présent document mettent à contribution les progrès technologiques comme l'emploi de photographies et d'ordinateurs qui rendent moins visibles l'acquisition et la conservation des renseignements concernant les citoyens[432]. Toutefois, on ne saurait s'autoriser de ces développements techniques pour donner un caractère clandestin aux fouilles, aux perquisitions et aux saisies. Bien au contraire, il est essentiel que l'on redouble de précautions afin d'assurer que les pouvoirs de la police sont exercés de façon ouverte. En effet, en plus de permettre que des fouilles ou des perquisitions soient effectuées sans motifs raisonnables, la concession du pouvoir d'entrer clandestinement lors d'enquêtes criminelles pourrait éventuellement encourager les agents de la paix à s'introduire chez les citoyens à des fins autres que celles qui sont expressément permises par la loi applicable. À cet égard, on ne saurait prendre à la légère les cas comme les opérations «Bricole» et «Ham», deux projets exécutés par la G.R.C. au Québec afin d'obtenir des renseignements concernant les activités politiques de certaines personnes[433].

372. Aux considérations d'ordre politique décrites ci-dessus s'ajoute le problème de nature constitutionnelle soulevé par les dispositions de l'article 8 de la *Charte canadienne des droits et libertés*, qui protègent les citoyens contre les «fouilles, les perquisitions et les saisies abusives». Les commentaires que l'on retrouve dans la jurisprudence américaine montrent que les perquisitions clandestines contreviennent aux dispositions du quatrième amendement dont le libellé est semblable. Dans l'affaire *Gouled* v. *United States*, qui portait sur une perquisition sans mandat, la Cour suprême des États-Unis a déclaré ce qui suit:

> [TRADUCTION]
> ... Lorsqu'un représentant d'un organisme quelconque de l'État s'introduit dans la demeure ou le bureau d'une personne soupçonnée d'infraction, et qu'il agit clandestinement, par l'entremise d'une connaissance ou sous le couvert d'une visite d'affaire, et que le propriétaire soit présent ou non lorsqu'il s'introduit chez ce dernier, toute fouille, perquisition ou saisie effectuée subséquemment, à l'insu et en l'absence de la personne concernée, est visée par la prohibition énoncée dans le quatrième amendement ...[434]

Cependant, le caractère général de ces remarques doit désormais être considéré à la lumière des limites fixées dans l'affaire *Dalia*. Sanctionnant l'existence du pouvoir d'effectuer une entrée clandes-

tine afin d'installer une table d'écoute, la Cour a décidé que de telles entrées [TRADUCTION] «étaient valides sur le plan constitutionnel, dans certaines circonstances, du moins lorsqu'elles sont effectuées en vertu d'un mandat[435]».

373. Quelle que soit la position qu'adopteraient les tribunaux canadiens en ce qui a trait aux fouilles et aux perquisitions effectuées clandestinement en vertu d'un mandat, nous en sommes venus à la conclusion que le pouvoir d'entrer clandestinement n'a pas de place dans le régime que nous proposons. Au cours des dernières années, on a introduit l'écoute électronique dans la législation canadienne, ainsi que des propositions visant à permettre aux agents de la paix d'intercepter le courrier de certaines personnes, dans le cadre de certaines enquêtes en matière pénale[436]. À l'instar de ces pouvoirs, les «investigations exploratoires» constituent de nouvelles formes d'atteinte à la vie privée. Aussi est-il essentiel qu'elles ne soient sanctionnées par la loi que dans la mesure où leur nécessité a été prouvée de façon convaincante. En l'absence de telles preuves, nous ne pouvons recommander l'adoption de dispositions autorisant l'entrée clandestine.

CHAPITRE NEUF

Les régimes particuliers du droit actuel

374. Au chapitre deux, nous avons décrit le contexte historique et les caractéristiques des diverses dispositions du droit actuel concernant les fouilles, les perquisitions et les saisies en matière criminelle. Bon nombre de ces dispositions ont été reprises, en tout ou en partie, dans les recommandations qui précèdent. De fait, le régime que nous proposons embrasse la totalité des pouvoirs de fouille, de perquisition et de saisie qui peuvent actuellement être exercés lors de l'arrestation de la personne visée, par suite du consentement de celle-ci ou encore en vertu du mandat prévu à l'article 443 du *Code criminel*. Toutefois, bon nombre de pouvoirs spéciaux liés à des contextes particuliers échappent à cette classification. Si l'on s'interroge sur le bien-fondé actuel de chacune de ces dispositions particulières, il faut tenir compte à la fois de leurs caractéristiques et de leurs origines historiques. Pour ce qui est des caractéristiques de ces dispositions, il convient de déterminer si les justifications et les règles de procédure qu'elles comportent se trouvent englobées dans l'ensemble de règles générales élaborées dans les chapitres précédents. Le cas échéant, les dispositions particulières en cause n'auraient plus de raison d'être. En revanche, dans la mesure où la disposition constitue une dérogation aux règles proposées, il y a lieu d'en examiner le bien-fondé.

I. Le mandat de main-forte

RECOMMANDATION

43. Le mandat de main-forte prévu par la *Loi sur les stupéfiants*, la *Loi des aliments et drogues*, la *Loi sur les douanes* et la *Loi sur l'accise* devrait être aboli.

375. Après avoir étudié l'historique, l'usage actuel et l'aspect judiciaire du mandat de main-forte, nous en recommandons l'abolition. Comme les débats actuels au sujet de la conservation du mandat de main-forte reposent souvent sur une conception fausse de ces trois thèmes, nous avons tenté, dans la première partie du présent document[437], de replacer ceux-ci dans une perspective juste. Nous sommes d'avis que si l'on examine ces questions à la lumière de nos autres recommandations, l'abolition du mandat de main-forte constitue une mesure à la fois sage et pondérée.

376. Tout au long de la seconde partie du présent document de travail, nous avons préconisé qu'en l'absence de consentement de la personne visée, l'entrée sans mandat dans un endroit privé ne soit autorisée que lorsque la vie humaine ou la sécurité sont en péril. Cette position repose à la fois sur des considérations théoriques et pratiques: l'intérêt qu'a le citoyen à protéger son espace privé contre les atteintes injustifiées, et le danger que des exceptions trop importantes à l'exigence du mandat rendent celle-ci illusoire. Le mandat de main-forte constitue une dérogation sérieuse aux règles de procédure qui caractérisent le mandat de perquisition: il n'est pas délivré de façon «judiciaire», ni «spécifique» quant à l'atteinte autorisée. Nous estimons que les arguments invoqués par les défenseurs du mandat de main-forte ne sauraient justifier de telles dérogations.

377. Notre position est renforcée par l'existence du mécanisme de protection prévu à l'article 8 de la *Charte canadienne des droits et libertés*, contre les fouilles, les perquisitions et les saisies abusives. À ce propos, il convient de signaler que l'objectif principal du quatrième amendement de la Constitution américaine était justement la prohibition des perquisitions à caractère discrétionnaire autorisées par des mandats, auxquelles les Américains avaient été soumis, à l'époque où les États-Unis étaient encore une colonie britannique[438]. Bien que la disposition du quatrième amendement qui porte sur le mandat de perquisition n'ait pas été reprise en termes explicites à l'article 8 de la *Charte*, il est permis de penser que le mandat de main-forte est visé par le terme «abusives» utilisé dans la *Charte*. Étant donné qu'en vertu de la législation actuelle, la délivrance du mandat de main-forte échappe à tout pouvoir discrétionnaire de nature judiciaire, les tribunaux pourraient juger que les dispositions qui en permettent la délivrance vont à l'encontre du critère du caractère raisonnable reconnu par la *Charte*. Certes, le pouvoir de s'introduire dans un endroit sous l'autorité d'un mandat de main-forte est assujetti, aux termes de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, à l'existence de «motifs raisonnables». Il n'en reste pas moins que selon nous, le fait d'imposer

que l'acte soit autorisé au préalable par un fonctionnaire judiciaire, par suite du dépôt d'une dénonciation faite sous serment, est encore la meilleure façon d'assurer le respect de ce critère. Il n'est pas sûr que les tribunaux canadiens jugeront que le libellé de l'article 8 de la *Charte* justifie une position aussi rigoureuse, laquelle est analogue à celle que l'on a adoptée aux États-Unis. Quoi qu'il en soit, cela aurait pour effet de renforcer la règle constitutionnelle. Par ailleurs, signalons qu'en vertu des dispositions de l'article 139 de la *Loi sur les douanes*[439] et de l'article 72 de la *Loi sur l'accise*[440], l'utilisation du mandat de main-forte n'est pas soumise à l'existence de motifs raisonnables.

378. Les défenseurs du mandat de main-forte ont souligné que la G.R.C. avait intégré des garanties, sur le plan administratif, dans ses directives concernant l'utilisation du mandat de main-forte. En matière de stupéfiants et de drogues, en vertu de ces directives, les agents ne peuvent utiliser le mandat de main-forte que lors d'enquêtes importantes, dans des circonstances justifiant la délivrance d'un mandat de perquisition, mais lorsque la fouille immédiate d'une maison d'habitation est nécessaire au succès de l'enquête[441]. Par ailleurs, il est vrai que les exigences documentaires postérieures à l'acte qui ont été intégrées à ces directives sont assez rigoureuses, à telle enseigne que nous nous en sommes inspirés pour élaborer les modalités du rapport qui doit être fait aux termes de la recommandation 37, lors d'une saisie sans mandat[442]. Au cours de l'enquête sur le mandat, les recherchistes de la Commission ont pu examiner certains exemples de ces rapports. On y trouve des comptes rendus de perquisitions effectuées lorsqu'il existait des raisons de croire que si les motifs de la perquisition avaient été exposés sous serment devant un juge de paix avant le début de la perquisition, ces motifs auraient, de façon générale, été suffisants pour justifier la délivrance d'un mandat de perquisition.

379. Pourtant, il existe une différence majeure entre les directives de nature administrative régissant l'utilisation du mandat de main-forte et les mécanismes de protection que comporte le mandat de perquisition. En premier lieu, étant donné que dans le cas du mandat de main-forte, les motifs de la perquisition sont exposés après l'exécution de celle-ci, ils peuvent avoir été grandement renforcés par les renseignements recueillis au cours de la perquisition. Or, cette hypothèse pèche contre l'exigence des preuves préalables, exigence que Hale avait, à l'origine, incorporée aux mandats visant les biens volés, et qui depuis, est restée l'une des caractéristiques fondamentales du mandat de perquisition[443]. En

second lieu, ce qui importe plus encore, les directives actuellement en vigueur au sein de la G.R.C. ne sont que des règles de conduite de nature administrative et par conséquent, n'ont aucun effet obligatoire sur le plan juridique. Sans nier la valeur des mécanismes de contrôle administratif, nous estimons que le citoyen est en droit d'être protégé par la loi lorsqu'il s'agit d'atteintes aussi graves que la violation de son espace privé. À cet égard, il convient de noter que les directives internes de la G.R.C. constituent, du moins en partie, une réponse à la controverse dont le mandat de main-forte fait l'objet. Quoique sage et même louable, cette solution n'offre pas les garanties formelles de la loi.

380. Certaines autorités, qui préconisaient le maintien du mandat de main-forte, se sont montrées disposées à entourer celui-ci de nouvelles garanties[444], notamment de soumettre la délivrance du mandat à l'exercice d'un pouvoir discrétionnaire de nature judiciaire. Il est possible que l'on ait proposé ce compromis en réponse aux objections formulées par les juges de la Cour fédérale qui, en vertu de la législation actuelle, sont chargés de délivrer le mandat. Pourtant, les mesures que l'on a proposées à cette fin sont très limitées. Par exemple, d'après un ensemble de propositions formulées en 1978 par le ministre fédéral de la Justice, le juge compétent aurait été tenu de déterminer s'il était nécessaire, «pour le plus grand avantage de la justice, de délivrer un mandat visant le domaine précis où l'agent de la G.R.C. qui y est nommé remplit ses fonctions», et si l'agent à qui le mandat est décerné avait acquis le nombre d'années d'expérience prévu par la loi, en matière d'application de la loi[445]. Ainsi, au lieu de confier au juge la tâche d'exercer un pouvoir véritablement discrétionnaire et de statuer de façon ponctuelle sur les cas qui lui sont présentés, en vertu de ces propositions, le rôle du juge se limite à déterminer l'ancienneté de l'agent, et à évaluer les besoins locaux en matière d'application de la loi. Il est certain que le fait de limiter la portée du mandat de main-forte dans le temps et dans l'espace rendrait la délivrance de celui-ci moins lourde de conséquences, par comparaison avec les pouvoirs extrêmement larges réprouvés par le juge Jackett dans l'affaire *Re Writs of Assistance*. Cependant, nous ne sommes pas convaincus que les juges auraient l'impression de détenir un pouvoir discrétionnaire plus grand en vertu de ces propositions qu'en vertu de la législation actuelle, pour rejeter une demande[446].

381. Dans une certaine mesure, les arguments militant en faveur du maintien du mandat de main-forte reposent sur l'efficacité de celui-ci en tant qu'instrument d'application de la loi, ainsi que sur

l'usage prudent que l'on en a fait. Ainsi, on a invoqué le taux de succès des perquisitions effectuées en vertu d'un mandat de main-forte afin de prouver que celui-ci n'avait pas été utilisé de façon arbitraire[447]. Au demeurant, les résultats de notre enquête sur le mandat corroborent, jusqu'à un certain point, ces prétentions[448]. Il semble en effet que l'utilisation du mandat de main-forte aboutisse généralement à une saisie, et que l'objet saisi soit souvent celui que l'on recherchait. Toutefois, ces données ne montrent qu'une partie de la réalité. En effet, elles ne prouvent pas que les perquisitions qui ont eu lieu n'auraient pas pu être exécutées aussi efficacement en vertu d'une autre source de pouvoir comme le mandat de perquisition ou la fouille concomitante de l'arrestation.

382. Les défenseurs du mandat de main-forte soulignent les difficultés particulières auxquelles font face les enquêteurs en matière de stupéfiants et de drogues, notamment la nécessité, dans bien des cas, d'obtenir une autorisation très rapidement[449]. Effectivement, notre enquête sur le mandat a révélé que l'«urgence» des situations était la raison fondamentale pour laquelle les agents décidaient d'avoir recours au mandat de main-forte, en tant que mode d'autorisation, plutôt qu'au mandat de perquisition. Pourtant, les circonstances qui, de façon générale, entourent l'utilisation du mandat de main-forte montrent que dans bon nombre de cas, le recours à d'autres solutions comme le pouvoir de fouille concomitant de l'arrestation aurait suffi à autoriser la perquisition[450]. Nous croyons que ce pouvoir, de même que ceux qui découlent de nos recommandations concernant le mandat de perquisition, confèrent une grande latitude aux enquêteurs en matière de stupéfiants et de drogues[451]. Par ailleurs, dans la mesure où la prétendue impraticabilité du mandat de perquisition peut être imputable aux délais qu'implique l'aspect documentaire du processus d'obtention du mandat de perquisition, nous estimons que le mécanisme du télémandat prévu à la recommandation 19 constitue une solution satisfaisante[452].

383. En outre, les défenseurs du mandat de main-forte soutiennent que celui-ci est essentiel à l'accomplissement des fonctions de la police dans le cas d'infractions graves en matière de drogues, notamment dans les cas de «trafic»[453]. Or, cet argument ne correspond pas tout à fait aux conclusions que l'on peut tirer de notre enquête en ce qui a trait aux perquisitions effectuées en vertu d'un mandat de main-forte dans ce domaine. En fait, le nombre de perquisitions semblait légèrement plus élevé dans le cas de simple possession que dans le cas de trafic. Bien que certaines des drogues

visées dans les cas de possession aient pu être considérées comme des drogues «fortes» (l'héroïne, par exemple), les résultats de l'enquête montrent néanmoins que le mandat de main-forte est plus souvent utilisé pour prendre l'usager que le trafiquant[454].

384. Même si l'on en venait à la conclusion que les pouvoirs de perquisition en vertu de mandats de main-forte sont valides sur le plan constitutionnel au Canada, nous sommes d'avis que rien ne saurait justifier le maintien de tels pouvoirs. À cet égard, nous nous rallions à la position de la Commission de réforme du droit de l'Australie qui a conclu ce qui suit à propos des «mandats de perquisition de portée générale»:

> [TRADUCTION]
> Il ne fait aucun doute que les pouvoirs de fouille, de perquisition et de saisie sont un outil indispensable pour la police. Toutefois, ces pouvoirs peuvent avoir un effet néfaste dans la mesure où ils mettent généralement en péril la vie privée et les libertés individuelles. Leur usage doit donc être justifié chaque fois qu'ils sont employés. Dans cette optique, nous ne saurions cautionner le maintien des mandats de perquisition de portée générale. De l'avis de la Commission, les dispositions qui créent de tels pouvoirs devraient avoir été bannies des textes de loi du Marché commun et des Territoires depuis longtemps. Nous recommandons qu'elles soient abrogées sans plus tarder[455].

De même, nous ne saurions trop insister sur la nécessité d'abolir sans délai les mandats de main-forte au Canada.

II. Les autres pouvoirs spéciaux

RECOMMANDATION

44. Les dispositions particulières suivantes devraient être abrogées:

a) l'article 181 du *Code criminel*, portant sur les pouvoirs relatifs aux maisons de débauche et aux maisons de jeu,

b) l'article 182 du *Code criminel*, portant sur le mandat permettant de rechercher des femmes dans des maisons de débauche,

c) l'article 183 du *Code criminel*, portant sur l'interrogatoire de personnes trouvées dans des maisons de débauche,

d) l'article 353 du *Code criminel*, relatif au mandat en matière de métaux précieux,

e) le paragraphe 299(3) du *Code criminel*, portant sur la recherche de bois volé,

f) l'article 403 du *Code criminel*, portant sur la saisie de coqs dans une arène,

g) l'article 420 du *Code criminel*, portant sur la saisie de monnaie contrefaite,

h) l'article 10 de la *Loi sur les stupéfiants* et l'article 37 de la *Loi des aliments et drogues*, portant sur les pouvoirs de fouille, de perquisition et de saisie en matière de stupéfiants et de drogues.

A. Les dispositions relatives aux maisons de jeu et aux maisons de débauche

385. Au moment où nous recommandons l'abolition des pouvoirs conférés par les articles 181, 182 et 183 du *Code criminel*, le Parlement étudie des propositions visant à abroger les deux derniers de ces articles[456]. Bien que nous souscrivions aux propositions du ministre de la Justice à cet égard, nous ne pouvons préjuger de ce qu'il adviendra de la législation actuelle. C'est pourquoi notre étude embrasse tous les aspects des pouvoirs particuliers de fouille, de perquisition et de saisie dans le cas des maisons de jeu et des maisons de débauche.

(1) *Les pouvoirs prévus aux articles 181 et 183*

386. D'un point de vue historique, le mandat de perquisition prévu au paragraphe 181(1) du *Code criminel* s'est toujours distingué des autres types de mandats par deux caractéristiques essentielles: le mécanisme du «rapport écrit» et l'autorisation de mettre sous garde et d'interroger les personnes trouvées sur les lieux fouillés, en vertu des dispositions de l'article 183. Or, ces deux particularités dérogent aux règles que nous proposons. Outre ces caractéristiques du mandat en question, nous examinerons le pouvoir spécial de saisie sans mandat prévu au paragraphe 181(2).

387. Le «rapport écrit» est un mécanisme singulier sous deux rapports. En premier lieu, il s'agit du seul mandat à l'égard duquel le requérant n'est pas tenu de divulguer des motifs raisonnables dans sa

demande[457]. En second lieu, celle-ci n'est pas faite sous serment. Comme nous l'avons expliqué précédemment, ces caractéristiques découlent des origines particulières des dispositions de l'article 181 qui, initialement, correspondaient essentiellement à un mécanisme d'ordonnance interne de la police[458]. La garantie formelle de nature judiciaire, suivant laquelle le requérant devait satisfaire à un critère de preuve en prêtant serment, ne convenait tout simplement pas au contexte administratif initial de cette disposition. Toutefois, comme nous l'avons déjà signalé, une certaine protection avait à l'origine été intégrée à ce système par l'adoption d'une exigence accessoire suivant laquelle une plainte faite sous serment par un citoyen devait être annexée au rapport. Les garanties que comporte ce mécanisme semblent donc avoir diminué depuis les origines de celui-ci, bien que les dispositions de l'article 181 aient récemment été incluses dans la catégorie des dispositions portant expressément sur le «mandat».

388. Reste à savoir si ces pouvoirs exceptionnels ont toujours leur raison d'être. Au cours de discussions avec les recherchistes de la Commission, des agents de police de certaines forces canadiennes ont révélé que lors d'une perquisition dans des maisons de jeu et des maisons de débauche, il était essentiel d'agir très rapidement, et que le recours à la procédure traditionnelle de la «dénonciation sous serment» entravait grandement l'efficacité de la police. Par contre, des représentants d'autres forces se sont dits d'avis qu'en pratique, il y avait peu de différences entre la préparation de la demande prévue à l'article 443 et celle de l'article 181. En ce qui a trait à la présentation de motifs raisonnables, ce dernier point de vue semble conforme à la décision rendue dans l'affaire *Foster*[459], où l'on a jugé que si le rapport ne comportait pas de motifs raisonnables, le juge de paix avait l'obligation de chercher à obtenir des renseignements supplémentaires. De fait, d'après l'échantillon des mandats examinés au cours de l'enquête de la Commission, il semble que les policiers de Saint-Jean et d'Edmonton aient pris l'habitude d'exposer des motifs dans leur rapport, malgré l'absence d'exigence légale à cet effet. En outre, l'enquête a révélé que dans certaines villes, les agents de police ont plus souvent recours aux dispositions de l'article 443 qu'à celles de l'article 181 lorsqu'ils soupçonnent qu'une infraction a été commise relativement à une maison de jeu ou à une maison de débauche[460]. Ce fait contribue à réfuter l'argument suivant lequel les règles prévues à l'article 443 seraient impraticables dans le cas des maisons de jeu et des maisons de débauche.

389. Par ailleurs, rien ne justifie la conservation du pouvoir de mettre sous garde et d'interroger les personnes trouvées sur les lieux

de la perquisition. À strictement parler, ce pouvoir ne participe pas vraiment des fouilles, des perquisitions et des saisies. En fait, il permet plutôt de détenir une personne sans l'avoir arrêtée, et de la forcer à se soumettre à un interrogatoire, indépendamment des restrictions traditionnelles qui limitent le pouvoir des policiers de forcer les citoyens à collaborer. Il va sans dire que les dérogations prévues à l'article 183 sont très graves, comme l'a souligné la Cour du Banc de la Reine de la Saskatchewan dans l'affaire *Re Sommerville*. Selon cette décision, les dispositions de l'article 183 ne peuvent être utilisées que pour obtenir des renseignements concernant deux choses, soit la destination des lieux et l'exécution de la perquisition[461]. Même si les questions posées restent dans des limites acceptables, ces dispositions donnent néanmoins aux policiers le pouvoir exorbitant de forcer les citoyens à collaborer avec eux. Tout en faisant remarquer avec insistance que ce pouvoir était rarement utilisé, certains représentants des forces de police ont tout de même fait allusion à des cas où l'on y avait eu recours afin de forcer la personne interrogée à divulguer l'identité du tenancier d'un établissement suspect.

390. Par ailleurs, nous ne pouvons trouver aucune raison valable pour justifier le maintien du pouvoir de saisie sans mandat prévu au paragraphe 181(2). En fait, les représentants d'un certain nombre de forces de police rencontrés par les recherchistes de la Commission ont affirmé que ces dispositions n'étaient jamais utilisées. Les directives émises par ces forces de police obligent l'agent à obtenir un mandat dans tous les cas. En revanche, des représentants d'autres forces ont soutenu que ce pouvoir de saisie sans mandat pouvait être utile à l'occasion. On a notamment fait état des cas où les policiers font irruption dans un lieu pendant qu'un jeu illégal est en cours, de ceux où un jeu illégal a lieu dans un endroit public, et des situations d'urgence. Toutefois, la décision rendue par la Cour suprême du Canada dans l'affaire *Rockert* c. *La Reine*[462] semble avoir réduit l'utilité de cette disposition même pour les forces de police qui y avaient recours. Dans cette affaire, on a décidé que pour qu'un local puisse être visé par la définition du terme «maison de jeu» prévue au *Code criminel*, celui-ci devait avoir été utilisé aux fins prescrites de façon habituelle. En conséquence, il est possible que l'on ne puisse avoir recours aux dispositions du paragraphe 181(2) lorsque le local ne fait que commencer à être utilisé pour le jeu, ou lorsqu'il ne l'est que de façon occasionnelle.

391. Ces dérogations pourraient à la rigueur être défendables si l'application des dispositions relatives aux maisons de jeu et de

débauche répondait à des objectifs majeurs. Bien au contraire, l'actualité des principes de base en la matière est fort discutable. Il en va de même de l'idée que l'on avait au dix-neuvième siècle de réprimer des crimes plus graves en contrôlant ce genre d'activités. Du reste, la Commission a déjà cité les règles de droit relatives aux jeux illégaux à titre d'exemples d'infractions qui devraient être reconsidérées à la lumière des valeurs actuelles de la société[463]. Même si ces activités devaient continuer à être interdites, l'existence de pouvoirs de fouille, de perquisition et de saisie particuliers dans ce domaine est difficilement justifiable.

392. Des représentants de certaines forces de police canadiennes ont signalé, non sans quelque inquiétude, que l'absence de mandat spécial pourrait rendre inopérante la présomption prévue à l'alinéa 180(1)*a*), dont voici la teneur:

> *a*) la preuve qu'un agent de la paix qui était autorisé à pénétrer dans un local en a été volontairement empêché, ou que son entrée a été volontairement gênée ou retardée, constitue, en l'absence de toute preuve contraire, une preuve que le local est une maison de désordre; ...

La question du bien-fondé de cette disposition déborde le cadre de la présente étude. Néanmoins, on remarquera que cette présomption ne découle pas de l'existence du mandat prévu à l'article 181, mais uniquement du pouvoir de l'agent de la paix d'entrer dans les locaux en question. Or, un tel pouvoir peut provenir de n'importe quel type de mandat, aussi bien de celui qu'établissent nos recommandations que de celui qui est prévu à l'article 443 du *Code criminel*.

(2) *Les femmes dans les maisons de débauche*

393. Le mandat prévu à l'article 182 du *Code* semble rarement utilisé. L'enquête de la Commission n'en a révélé aucun cas d'application. Par ailleurs, les policiers rencontrés à Winnipeg, à Toronto, à Ottawa, à Calgary et à Montréal ne voyaient aucune utilité dans cette disposition et n'ont pu se souvenir d'aucun cas où elle avait été utilisée.

394. L'ensemble de règles générales que contient le présent document enlèverait tout intérêt à ce mandat, si tant est qu'il en ait jamais eu. Nous avons déjà recommandé la création d'un pouvoir de perquisition permettant de délivrer les personnes détenues illégalement[464]. Dans les cas où la détention d'une femme qui aurait été «entraînée» ou «cachée» dans une maison de débauche ne serait pas illégale, il n'existe tout simplement aucune raison valable de

permettre l'exercice d'un pouvoir de perquisition et de délivrance, et encore moins d'un pouvoir de fouille, de perquisition et de saisie. Lorsque la police désire placer une femme sous sa garde dans des circonstances qui ne correspondent pas vraiment à la délivrance de cette dernière, elle doit alors se conformer aux règles ordinaires justifiant un tel acte, c'est-à-dire celles de l'arrestation. Si à l'origine, l'adoption du mandat visant les femmes dans les maisons de débauche répondait au désir véritable de réprimer l'exploitation des femmes, de nos jours, son existence n'est plus justifiable.

B. Les métaux précieux

395. Avec tout son pittoresque, le mandat prévu à l'article 353 ne fait en réalité qu'encombrer davantage le *Code criminel*[465]. Comme l'on pouvait s'y attendre, notre enquête sur les perquisitions avec mandat n'a révélé aucun cas d'application de ce mandat dans les villes visées par l'enquête. Pour ce qui est des régions rurales, si jamais ce mandat a été utilisé, le secret reste bien gardé. En effet, dans une tentative désespérée pour en découvrir ne serait-ce qu'un seul cas d'emploi, les recherchistes de la Commission se sont adressés à certains greffes du Yukon et des Territoires du Nord-Ouest. Il n'ont pu trouver un seul juge qui pouvait se rappeler avoir jamais délivré un tel mandat. Les dispositions de l'article 353 ont été adoptées dans le contexte de l'exploitation minière frontalière au milieu du dix-neuvième siècle. Cette époque est maintenant bien révolue et le mécanisme administratif dont l'application était assurée par ce mandat n'a plus sa raison d'être.

396. Par ailleurs, les dispositions en cause s'appliquent encore à l'infraction de fraude en matière de minéraux, elle-même agonisante, qui est prévue à l'article 352. La Commission de réforme du droit du Canada a déjà proposé un ensemble de règles concernant les infractions qui participent du vol et de la fraude. L'adoption de ces recommandations emporterait la disparition de dispositions aussi particulières que celles de l'article 352 du *Code criminel*[466]. Toutefois, même si l'infraction de fraude relative à des minéraux devait être conservée, les dispositions établissant un mandat particulier dans ce domaine n'auraient plus d'intérêt, même en théorie. En effet, elles n'ajouteraient rien aux recommandations générales que nous avons faites, ni aux pouvoirs que comporte actuellement l'arrestation et à ceux que confèrent les dispositions de l'article 443.

C. Le bois volé

397. De nos jours, les dispositions de l'article 299 du *Code criminel* semblent avoir peu d'application. Il est vrai que les manuels de formation d'un certain nombre de forces de police font encore mention de cette infraction[467]. Toutefois, le nombre relativement négligeable de poursuites intentées en vertu de ces dispositions au cours des dernières années montre clairement le très faible usage qui est fait du pouvoir de perquisition qui y est prévu. Ainsi, en 1978, seulement trois accusations ont été portées en Colombie-Britannique et au Québec, c'est-à-dire deux des provinces qui produisent le plus de bois au Canada[468]. En outre, l'enregistrement de marques de bois, qui constitue l'un des éléments essentiels du pouvoir de perquisition dans ce domaine, tend à disparaître. Par conséquent, nous recommandons que ces dispositions particulières soient abrogées.

D. Les combats de coqs

398. Il semble également que de nos jours, les dispositions du *Code criminel* relatives aux combats de coqs ne sont que très rarement utilisées. Ainsi, les statistiques judiciaires les plus récentes en matière pénale, qui datent de 1978, révèlent, bien qu'elles ne soient que partielles, qu'une seule poursuite a été intentée dans ce domaine dans les provinces de la Colombie-Britannique et du Québec[469]. Si tant est que cette disposition ait jamais eu une quelconque utilité, les législations provinciales portant sur la cruauté envers les animaux lui ont probablement enlevé tout intérêt[470]. Bien que certains agents de la paix aient raconté des anecdotes intéressantes aux recherchistes de la Commission, concernant des poursuites en matière de combats de coqs, aucun d'entre eux ne se souvenait d'avoir utilisé le pouvoir de saisie prévu par ces dispositions. En conséquence, nous recommandons l'abrogation des dispositions du paragraphe 403(2) du *Code criminel*.

E. La monnaie contrefaite

399. Contrairement aux dispositions relatives au bois volé et aux combats de coqs, dans l'état actuel du droit, le pouvoir de saisie

prévu par les dispositions concernant la monnaie contrefaite présente un certain intérêt pour les agents de la paix. En 1978, 226 accusations ont été portées en matière de contrefaçon et d'infractions relatives à la monnaie. Bien qu'il représente une part minime des accusations criminelles portées au Canada, ce nombre reste assez important comparativement à celui des infractions en matière de combats de coqs et de bois volé[471]. Il convient donc de se demander si les dispositions particulières de l'article 420 ajoutent au pouvoir de saisir des objets dont la possession, dans les circonstances de l'espèce, constitue une infraction, ou qui constituent la preuve d'un crime.

400. Les agents de la paix ont signalé deux types de situations dans lesquelles ces dispositions pouvaient être utiles. En premier lieu, elles permettent la saisie sans mandat de fausse monnaie dans les cas où le détenteur lui-même n'est pas soupçonné d'avoir participé à l'infraction. Sans les dispositions de l'article 420, les agents de la paix ne pourraient saisir l'argent sans mandat, à moins d'arrêter la personne ou d'obtenir son consentement. En second lieu, elles permettent à l'agent de la paix qui se trouve légalement dans un lieu occupé à des fins commerciales de saisir rapidement la monnaie contrefaite qui s'y trouve, même si celle-ci n'est pas sous le pouvoir du suspect et, partant, ne peut être saisie par suite de l'arrestation. Comme le second cas est manifestement visé par la doctrine des «choses bien en vue» que nous avons incorporée à la recommandation 30, nous n'étudierons que le premier type de situation.

401. Il convient de signaler que dans le cas de possession d'autres types de biens illégaux, tels les instruments d'effraction, le *Code criminel* ne prévoit aucun pouvoir de saisie sans mandat et ce, même si les indicateurs de la gravité de l'infraction, comme la peine maximale, sont les mêmes que dans le cas de la contrefaçon. Il est possible qu'une fois alertée, une personne innocente, éprouvant des réticences à se départir de monnaie contrefaite sans compensation puisse tenter de faire obstacle à la saisie pendant le délai nécessaire à l'obtention d'un mandat. Dans un tel cas, l'agent de la paix devrait déterminer si la saisie sans mandat est justifiée par suite de l'arrestation ou par la doctrine des «choses bien en vue».

402. De toute évidence, les dispositions de l'article 420 constituent une sorte de compromis en vertu duquel on ferme les yeux sur le pouvoir discrétionnaire particulier qu'il confère aux agents de la paix, en vue de sauvegarder l'intégrité des devises de Sa Majesté. Nous recommandons, du moins aux fins de la législation en matière criminelle, que la saisie de monnaie contrefaite et

d'instruments servant à la contrefaçon soit régie par les mêmes principes que celle d'autres biens dont la possession est illégale.

F. Les stupéfiants et les drogues

403. Après avoir traité du mandat de main-forte dans le contexte de la recommandation 43, abordons maintenant les autres pouvoirs de fouille, de perquisition et de saisie prévus à la *Loi sur les stupéfiants* et la *Loi des aliments et drogues*. Même si les dispositions qui établissent ces pouvoirs présentent un caractère exceptionnel par rapport aux normes que nous avons établies relativement aux règles de procédure, il importe de noter qu'en pratique, leur utilisation est très courante. Ainsi, parmi les 1 825 mandats exécutés et soumis à notre enquête, 488 visaient des stupéfiants ou des drogues[472]. Dans le cas de fouilles de personnes sans mandat, la recherche de stupéfiants ou de drogues est également fréquente[473].

404. Si les pouvoirs de perquisition particuliers applicables en matière de stupéfiants et de drogues étaient abolis, désormais, en l'absence du consentement de la personne visée, toute introduction dans un lieu privé, qu'il s'agisse ou non d'une maison d'habitation, nécessiterait l'obtention d'un mandat, à moins que la vie humaine ou la sécurité ne soient en péril. Bien qu'une telle modification puisse sembler draconienne eu égard à l'état actuel du droit canadien, il importe de se rappeler que les pouvoirs de perquisition sans mandat actuellement conférés aux agents de la paix canadiens en matière de stupéfiants et de drogues ont une portée beaucoup plus large que ceux des autres pays dont le droit s'inscrit dans la tradition du common law.

405. En Angleterre par exemple, l'agent de la paix doit détenir un mandat pour s'introduire dans un lieu afin d'y rechercher des drogues dont la possession est illégale[474]. D'ailleurs, signalons que la Commission royale britannique sur la procédure pénale a souscrit à cette position:

> [TRADUCTION]
> 3.39. On nous a présenté peu d'arguments militant en faveur de l'instauration d'un pouvoir de nature coercitive permettant d'entrer et de perquisitionner sans mandat ou autre autorisation écrite, avant l'arrestation. Nous sommes d'avis qu'une telle atteinte à la vie privée des citoyens devrait toujours être autorisée au préalable et d'une façon

> officielle, quel que soit le but de la perquisition. Les pouvoirs actuels sont essentiellement limités à l'entrée et à la perquisition en vue de rechercher des objets dont la possession volontaire constitue une infraction (et que nous appellerons objets prohibés), par exemple des biens volés, des drogues, des armes et des explosifs .... Dans le cas de tels biens, le mandat ne devrait être délivré que si l'agent de la paix démontre à l'autorité chargée de la délivrance, qu'il soupçonne, pour des motifs raisonnables, que les objets visés par la perquisition projetée se trouvent à l'endroit spécifié[475].

Par ailleurs, la position adoptée aux États-Unis est encore plus restrictive. En effet, les tribunaux américains ont jugé qu'en l'absence de circonstances urgentes définies de façon très rigoureuse, l'introduction sans mandat dans un lieu, en vue d'y rechercher des biens dont la possession est illégale, était *a priori* «abusive» et inconstitutionnelle[476]. En Australie, le *Criminal Investigation Bill* actuellement à l'étude permet de perquisitionner sans mandat dans les lieux privés, en vue de rechercher des objets comme des stupéfiants, afin de prévenir leur perte ou leur destruction. Toutefois, en proposant la création d'un tel pouvoir, la Commission de réforme du droit de l'Australie a exprimé le souhait que la loi donne à ce pouvoir de nature attentatoire un caractère judiciaire [TRADUCTION] «le plus semblable possible à celui que l'on a adopté aux États-Unis[477]». Le pays dont le droit est le plus semblable à celui du Canada à cet égard est la Nouvelle-Zélande, où les agents de police peuvent perquisitionner sans mandat en vue de rechercher certaines catégories de [TRADUCTION] «drogues à usage restreint», dont le cannabis, la cocaïne, l'opium et la morphine[478].

406. Si l'on devait considérer que le pouvoir de perquisitionner sans mandat dans les lieux privés est justifiable en matière de stupéfiants et de drogues, l'exercice de ce pouvoir devrait être rigoureusement limité aux drogues et aux stupéfiants très dangereux et aux situations particulièrement urgentes où la perte ou la destruction des objets est imminente. Pour les raisons que nous avons expliquées ci-dessus, nous estimons que les critères d'urgence sont difficiles à définir et à appliquer. Même si les infractions en matière de stupéfiants et de drogues sont généralement graves, il reste difficile de justifier, à seule fin de prévenir la perte ou la destruction de choses «saisissables», une telle dérogation aux principes restreignant les perquisitions sans mandat dans les lieux privés[479]. Pour les cas où il serait impossible d'obtenir un mandat de la façon habituelle, l'ensemble de règles que nous proposons laisse à l'agent de la paix la possibilité de saisir les stupéfiants ou les drogues lors de

l'arrestation de la personne dont on croit qu'elle se trouve sur les lieux, ou d'obtenir un télémandat.

407. Notre recommandation vise également d'autres dispositions. En effet, nous avons déjà cité les dispositions applicables aux stupéfiants et aux drogues afin d'illustrer les disparités qui existent entre les motifs justifiant l'introduction dans un lieu et les pouvoirs d'exécution que détiennent les agents de la paix une fois qu'ils sont sur les lieux[480]. Or, ce manque d'uniformité mine le mécanisme de contrôle que constitue le mandat, dans la mesure où l'agent de la paix détient un pouvoir discrétionnaire très large en ce qui a trait à la portée de la perquisition, notamment aux personnes qu'il peut fouiller et aux choses qu'il peut saisir. Les propositions générales que nous avons élaborées visent à éviter un tel manque d'harmonie, en permettant que le mandat énonce la plupart des actes que l'agent de la paix peut avoir à accomplir dans l'exercice légitime de ses pouvoirs de fouille, de perquisition et de saisie. Pour ce qui est des circonstances qui ne peuvent être prévues par le mandat, comme la découverte de choses saisissables dont la présence n'était pas soupçonnée, nous avons tenté d'élaborer des solutions justes et équilibrées. L'application de nos recommandations aux perquisitions en matière de stupéfiants et de drogues rendrait inutile certains des pouvoirs assez singuliers qui sont prévus par la législation actuelle.

408. Prenons, par exemple, la saisie d'objets constituant la preuve d'une infraction. Actuellement, il n'est pas sûr qu'une telle saisie puisse être effectuée sous l'autorité d'un mandat délivré en vertu de la *Loi sur les stupéfiants* ou de la *Loi des aliments et drogues*, puisque celui-ci ne peut viser que les drogues ou les stupéfiants eux-mêmes. Toutefois, les preuves d'une infraction peuvent être saisies par l'agent de la paix au cours de l'exécution de la perquisition. Il est difficile de trouver une seule raison valide pour justifier cette restriction que comportent les mandats prévus par la législation actuelle en matière de stupéfiants et de drogues. En fait, à cause de cette restriction, les agents de la paix en sont venus à recourir à des artifices, comme des allégations de complot, en vue de se prévaloir des pouvoirs prévus au *Code criminel* et de saisir des documents se trouvant dans des lieux tels les bureaux d'une compagnie de téléphone, où il est peu probable que des stupéfiants ou des drogues puissent être trouvés. L'application des règles générales rendrait cette pratique inutile.

409. Les dispositions actuelles de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues* permettant la fouille de toute personne trouvée sur les lieux d'une perquisition s'expliquent

historiquement par l'absence de pouvoir général de fouille en dehors du contexte de l'arrestation. En revanche, nos recommandations ne permettent la fouille personnelle que lorsque celle-ci est autorisée par un mandat ou lorsqu'elle survient lors de l'arrestation. Il n'existe aucune raison valable pour que les perquisitions en matière de drogues ou de stupéfiants échappent à cette règle. Au demeurant, les arguments militant en faveur de celle-ci ont été invoqués à plusieurs reprises dans le contexte des perquisitions en matière de stupéfiants et de drogues. Ainsi, la décision rendue aux États-Unis dans l'affaire *Ybarra*, qui fait autorité sur ce point en matière constitutionnelle, portait sur une descente qui avait eu lieu dans une taverne[481]. Au Canada, après avoir fait enquête sur une descente semblable à Fort Erie (Ontario), la Commission Pringle a fait la recommandation suivante:

> [TRADUCTION]
> Il ne devrait pas être permis de fouiller les personnes trouvées dans un lieu autre qu'une maison d'habitation, lorsqu'il n'existe aucun motif raisonnable de croire qu'elles sont en possession d'un stupéfiant ou d'un objet lié à la possession d'un stupéfiant par elles-mêmes ou par d'autres personnes, et lorsque la fouille n'est basée que sur leur présence légitime à cet endroit[482].

410. Eu égard au caractère discrétionnaire du pouvoir de fouiller des personnes en vue de retrouver des stupéfiants ou des drogues, il est à craindre que ce pouvoir puisse être exercé, non pas à cause de l'acte qu'une personne est soupçonnée d'avoir commis, mais plutôt à cause de sa personnalité, de son appartenance à une minorité, ou du fait qu'elle correspond à l'idée que se font les policiers d'un consommateur ou d'un trafiquant de drogues. Or, une telle hypothèse est valable aussi bien pour les fouilles qui ont lieu dans la rue que celles qui sont exécutées dans les lieux privés. Quelle que soit l'importance de l'application du droit pénal dans un cas donné, nous sommes d'avis que les agents de la paix ne devraient pas être admis à fouiller de façon systématique les membres d'un groupe déterminé, ni au hasard. Si l'on conservait un pouvoir de fouille aussi général, celui-ci pourrait éventuellement être utilisé dans des cas qui ne s'y prêtent pas et de façon arbitraire.

411. Les représentants des forces de police se sont dits inquiets à l'idée de perdre le pouvoir particulier de fouiller des personnes afin de retrouver des stupéfiants ou des drogues. Ils soutiennent essentiellement qu'il existe des cas où ils soupçonnent, par pure intuition, que certains membres d'un groupe sont en possession de drogues, mais qu'ils hésitent à engager leur responsabilité en tentant

de soumettre leurs «intuitions» au critère des «motifs raisonnables». Il s'agit notamment du cas où de nombreuses personnes sont présentes lors d'une perquisition. Pour que cet argument ait un certain poids, il faudrait être en mesure de démontrer que ces «intuitions» sont généralement fondées et donnent souvent lieu à la saisie de drogues sur de telles personnes. Pourtant, les résultats de l'enquête de la Commission tendent plutôt à prouver le contraire. Par exemple, sur les trente-deux saisies de drogues chimiques visées par l'enquête sur le mandat, seulement 18,6 pour cent résultaient de fouilles sommaires ou de fouilles à nu. Et bien que le nombre de saisies de marijuana ait été beaucoup plus élevé (412), la proportion de celles qui ont résulté de fouilles de personnes est encore plus faible (5,8 pour cent). Dans la plupart des cas de saisies de stupéfiants et de drogues, l'action entreprise pour découvrir ceux-ci se limitait soit à un «examen visuel» des lieux, soit à la fouille des «tiroirs, armoires, placards et cartons[483]». Force nous est de reconnaître que dans certains cas, les fouilles de personnes peuvent être efficaces en matière de stupéfiants et de drogues. En revanche, ces données montrent que les cas où des drogues ou des stupéfiants sont trouvés sur des personnes ne sont pas assez fréquents pour justifier l'existence de pouvoirs discrétionnaires aussi larges que ceux qui sont prévus par la législation actuelle. Comme lorsqu'il s'agit d'autres objets spécifiés dans un mandat, une personne ne devrait pouvoir être fouillée que s'il existe des motifs raisonnables de croire qu'elle porte sur elle des stupéfiants ou des drogues.

412. Enfin, les dispositions du paragraphe 10(4) de la *Loi sur les stupéfiants* et du paragraphe 37(4) de la *Loi des aliments et drogues* confèrent à l'agent de la paix le pouvoir d'utiliser la force afin d'ouvrir divers contenants et objets. Ces pouvoirs très étendus n'existent sous leur forme actuelle que depuis 1960-1961, date à laquelle les deux lois susmentionnées ont été modifiées[484]. Ces modifications ont en outre été d'une grande importance, dans la mesure où elles ont introduit le recours au mandat de main-forte dans le mécanisme de fouille, de perquisition et de saisie prévu à la *Loi des aliments et drogues*. De fait, le pouvoir exceptionnel d'employer la force s'apparente au mandat de main-forte et correspond, sur le plan historique, à l'exercice de la prérogative royale dont découlaient les premières lois régissant l'usage du mandat de main-forte. L'existence de ce pouvoir exorbitant d'utiliser la force en matière de stupéfiants et de drogues peut donc s'expliquer par la transposition malheureuse du mécanisme du mandat de main-forte dans ce contexte. Toutefois, on peut difficilement justifier le maintien de ce pouvoir. En effet, eu égard à la recommandation 20, où l'on reprend les critères actuels

des «motifs raisonnables et probables» et de la «nécessité», cela reviendrait à donner à la police le pouvoir discrétionnaire d'employer la force, même en l'absence de tels motifs ou du moins, lorsque cela n'est pas nécessaire. Si tant est que les perquisitions effectuées en vertu de la *Loi sur les stupéfiants* ou de la *Loi des aliments et drogues* présentent des problèmes particuliers, la règle prévue à l'article 25 du *Code criminel* est suffisamment souple pour les régler[485].

413. Dans la mesure où il est impossible de justifier que l'on déroge à nos recommandations dans le cas des fouilles de personnes et de lieux, et de l'usage de la force, nous recommandons l'abolition des dispositions de l'article 10 de la *Loi sur les stupéfiants* et de l'article 37 de la *Loi des aliments et drogues*, qui confèrent des pouvoirs de fouille, de perquisition et de saisie exceptionnels en matière de stupéfiants et de drogues. Si l'usage illégal de stupéfiants et de drogues doit continuer d'être régi par des lois distinctes du *Code criminel*, les pouvoirs de fouille et de perquisition en matière criminelle que nous avons élaborés dans le présent document devraient être incorporés dans ces lois. À cet effet, une disposition expresse serait probablement inutile, étant donné les dispositions du paragraphe 27(2) de la *Loi d'interprétation* et les décisions dans lesquelles ces dispositions ont été appliquées en matière de fouille, de perquisition et de saisie[486].

G. Les publications obscènes, les histoires illustrées de crimes et la propagande haineuse

RECOMMANDATION

45. Les dispositions prévoyant des mandats spéciaux en matière de publications obscènes, d'histoires illustrées de crimes et de propagande haineuse devraient être considérées comme des dispositions à caractère normatif et non comme des règles de procédure pénale. En conséquence, si ces dispositions doivent être conservées, elles devraient être retirées du *Code criminel* et reprises dans un texte réglementaire.

414. Nous avons déjà reconnu dans le présent document qu'il était légitime de saisir des choses en vue d'empêcher la continuation d'une infraction[487]. Toutefois, suivant le système de procédure pénale traditionnel, la rétention, puis la confiscation ou la restitution des choses saisies sont des questions liées directement au dépôt

d'une accusation et à la décision rendue sur celle-ci à l'égard du possesseur. En revanche, le mécanisme *in rem* permet, à la suite d'une perquisition initiale, de décider si les biens doivent être restitués ou confisqués et ce, sans qu'il soit nécessaire d'avoir recours à la voie traditionnelle de la poursuite pénale. Il va sans dire que cette solution pèche contre les limites énoncées dans le premier volet du principe de la suprématie du droit de Dicey. En effet, il ne s'agit manifestement pas d'un processus au moyen duquel la perpétration d'une [TRADUCTION] «infraction précise à la loi [est] établie de la façon habituelle devant les tribunaux ordinaires du pays[488]». La question consiste à déterminer si les arguments que l'on peut invoquer à l'appui de ce mécanisme sont suffisamment convaincants pour en justifier le maintien.

415. Pour commencer, on peut soutenir que puisque le distributeur n'est pas inculpé, le mécanisme *in rem* lui permet d'échapper à une condamnation éventuelle, dans l'hypothèse où la publication contreviendrait effectivement à la loi. Cette protection est d'autant plus efficace que les tribunaux semblent enclins à imposer à la Couronne la charge de la preuve et les règles traditionnelles du droit pénal, bien qu'en vertu des dispositions du paragraphe 160(2) (publications obscènes et histoires illustrées de crimes) et de celles du paragraphe 281.3(2) (propagande haineuse), l'occupant soit tenu de «présenter les raisons pour lesquelles la matière saisie ne devraient pas être confisquées[489]». Autrement dit, suivant cet argument, la personne bénéficie de certaines des garanties inhérentes au procès pénal, sans toutefois s'exposer au risque majeur qu'il comporte.

416. Toutefois, force nous est de reconnaître que même en l'absence de condamnation, le mécanisme de saisie *in rem* cause à l'éditeur ou au distributeur un préjudice considérable. Dans l'affaire *R.* v. *Pipeline News*, par exemple, les autorités de la ville d'Edmonton ont saisi 2 580 exemplaires d'une publication, qui ont ensuite fait l'objet d'une ordonnance de confiscation[490]. En réalité, le préjudice éventuel ne découle pas seulement de l'ordonnance de confiscation. La simple détention des publications en attendant la décision peut entraîner des pertes très importantes. En effet, même si l'audition de la demande de confiscation doit avoir lieu dans les sept jours de la saisie, il faut tenir compte des retards possibles pour le prononcé de la décision. Ainsi, dans l'affaire *Pipeline News*, la décision de première instance n'a été rendue qu'un an après l'audition. Si l'on ajoute à ces délais les différentes possibilités d'appel et de demandes d'annulation du mandat, les conséquences d'une saisie injustifiée peuvent être ruineuses, surtout s'il s'agit de périodiques[491].

417. En somme, le seul argument que l'on puisse invoquer à la défense du mécanisme de saisie *in rem* est le suivant: bien que les conséquences de la saisie puissent être importantes, elles ne sont, *a priori*, pas aussi préjudiciables que celles que comporte une condamnation pénale. Par ailleurs, comme les personnes impliquées dans des poursuites liées à des publications obscènes et à des histoires illustrées de crimes sont presque toujours des compagnies, on peut soutenir que les facteurs comme l'emprisonnement et l'humiliation d'un casier judiciaire personnel n'entrent plus en jeu. Quoi qu'il en soit, il importe de noter que ni les dispositions de l'article 160 ni celles de l'article 281.3 du *Code criminel* n'empêchent le dépôt d'une accusation pénale par suite de la confiscation, bien que le consentement du procureur général soit alors nécessaire, dans le cas de l'article 160. Dans ces conditions, l'argument pouvant être invoqué à l'appui du mécanisme de saisie *in rem* n'est valide que dans la mesure où la Couronne se contentera d'obtenir une ordonnance de confiscation et renoncera à intenter des poursuites.

418. En fait, il appartient à la Couronne de décider d'avoir recours au mécanisme de saisie *in rem* plutôt qu'au processus traditionnel de poursuite, la seule différence étant que les poursuites en vertu des dispositions de l'article 281.3 nécessitent le consentement du procureur général, contrairement au mandat de l'article 160. Bien que ces mandats n'aient pas été visés par l'enquête de la Commission, des études antérieures effectuées par celle-ci[492] et des entrevues avec des représentants de forces de police ont fourni certains renseignements quant à leur usage. Ces renseignements montrent que dans une large mesure, le recours au mandat prévu à l'article 160 est une question de préférence locale. Il n'est jamais utilisé dans la plupart des villes, où l'on préfère avoir recours au processus normal de poursuite. Même dans les villes où il est utilisé, comme à Ottawa et à Toronto, les autorités préfèrent avoir recours à la procédure habituelle dans la plupart des cas. Par conséquent, si tant est que le mécanisme de saisie *in rem* offre quelque avantage pratique au distributeur ou à l'éditeur, il semble que cet avantage soit accordé de façon ponctuelle et discrétionnaire.

419. Il est difficile d'examiner la question du maintien du mécanisme de saisie *in rem* sans aborder le contenu des deux prohibitions distinctes dont ce mécanisme est censé assurer l'application. Cependant, il importe de distinguer les dispositions qui établissent le mécanisme de saisie *in rem* des règles de fond de la loi. En fait, l'historique de ces dispositions sert à renforcer cette distinction: le mandat prévu à l'article 160 n'est apparu dans la

législation canadienne que près de soixante-dix ans après les infractions en cause, et le Comité spécial, pour sa part, n'a pas recommandé la création d'un mandat en vue de la confiscation préalable à la condamnation. Pour ce qui est de savoir si les infractions concernant diverses catégories de publications devraient être abolies, il va sans dire que cette question doit être tranchée à la lumière de l'étude distincte des dispositions en cause. En revanche, l'opportunité du mécanisme de saisie *in rem* peut être examiné dans un contexte plus large. Si tant est qu'il soit souhaitable de réprimer la circulation de ce genre de publications, il reste à déterminer s'il est légitime d'avoir recours au mécanisme de saisie *in rem* à cette fin. Si l'on admet que le seul but de ce mécanisme est d'empêcher la circulation de ces publications, les dispositions en cause peuvent être identifiées comme des mesures à caractère normatif destinées à la protection du public. En tant que telles, elles n'ont pas leur place dans un code de procédure pénale.

420. Il est souvent difficile de distinguer entre l'application du droit pénal et la réglementation des publications par la censure et par les restrictions imposées à la distribution. Sur le plan constitutionnel, cependant, cette distinction a déjà été établie. Dans l'affaire *Nova Scotia Board of Censors* c. *McNeil*, la Cour suprême du Canada a décidé que l'"Amusements Regulation Board" créé en vertu de la loi néo-écossaise pouvait validement interdire la projection publique d'un film. M. le juge Ritchie a écrit ce qui suit au nom de la majorité:

> En vertu du pouvoir que lui attribue le par. 91(27), le Parlement du Canada a édicté le *Code criminel*, une loi pénale dont le but ultime est de définir et de punir le crime dont on a prouvé la perpétration.
>
> En revanche, la *Theatres and Amusements Act* ne vise ni à créer ni à punir une infraction criminelle, mais à réglementer une entreprise dans les limites de la province de façon à prévenir la présentation dans les salles de spectacles de représentations qui ne répondent pas aux normes de décence établies par la Commission.
>
> Les champs d'application de ces deux lois diffèrent donc fondamentalement pour deux motifs. En premier lieu, l'une vise la réglementation d'un commerce ou d'une entreprise alors que l'autre définit le crime et le sanctionne; en second lieu, l'une est préventive alors que l'autre est pénale[493].

421. La Cour ne s'est pas prononcée, dans l'affaire *McNeil*, sur la question de savoir si le Parlement fédéral pouvait lui-même établir une réglementation en matière de censure. Par ailleurs nous n'entendons pas soulever la question de la validité constitutionnelle des dispositions de l'article 160 et de l'article 281.3. Aux fins de la

présente étude, le jugement rédigé par le juge Ritchie est important dans la mesure où il assigne aux dispositions du *Code criminel* un rôle «punitif», plutôt qu'un rôle «préventif» plus large, et où il énonce clairement que la sanction des interdictions pénales en cause doit obligatoirement passer par la voie des poursuites pénales[494]. En conséquence, si le Parlement désire conserver un mécanisme de perquisition et de saisie à caractère préventif visant les publications obscènes, les histoires illustrées de crimes et la propagande haineuse, ce mécanisme devrait trouver sa place dans un contexte autre que celui du droit pénal et de la procédure pénale. À ce propos, il existe dans d'autres États un certain nombre de modèles réglementaires. Ainsi, l'"Indecent Publication Tribunal" de la Nouvelle-Zélande a souvent été cité en exemple par les auteurs qui ont étudié les dispositions canadiennes actuelles[495], bien que même dans ce pays, il ait fait l'objet de critiques[496]. Aux États-Unis, les publications obscènes sont visées par les dispositions du droit civil relatives à la confiscation[497]. Toutefois, il convient de noter qu'au Canada, la saisie préventive de publications inconvenantes est sanctionnée depuis longtemps, sur le plan réglementaire, par le *Tarif des douanes*[498].

422. Il ne nous appartient pas de déterminer si l'atteinte aux libertés que représente la saisie de documents avant la distribution de ceux-ci devrait être autorisée par le droit actuel, ni si les dispositions actuelles du *Tarif des douanes* sont satisfaisantes à cette fin. Nous estimons toutefois que si cette tâche devait être entreprise, il y aurait lieu de replacer celle-ci dans son contexte véritable, c'est-à-dire celui d'un mécanisme normatif et préventif, qui ne doit pas être confondu avec les pouvoirs de fouille, de perquisition et de saisie destinés à l'application du droit pénal, et ne doit pas être présenté sous la forme de tels pouvoirs. Sous leur forme actuelle, les articles 160 et 281.3 du *Code criminel* devraient être abrogés.

H. Les armes à feu

RECOMMANDATION

46. Le pouvoir de saisir des armes à feu, actuellement prévu aux articles 99 et 100 du *Code criminel*, est inclus dans les recommandations qui précèdent. Le mandat autorisant la saisie d'armes à feu en vertu de l'article 101 ne constitue pas un mécanisme utile pour l'application du droit pénal. Il peut cependant répondre à des objectifs légitimes dans le

contexte de la réglementation de la possession d'armes à feu. Ce texte devrait donc être reformulé, afin

a) de relier plus étroitement les textes relatifs aux fouilles, aux perquisitions et aux saisies, et les dispositions sur la confiscation *in rem*, et

b) de n'autoriser les perquisitions que lorsque l'on est fondé à croire qu'une arme se trouve en possession, sous la garde ou sous le pouvoir de la personne visée.

423. Nous avons reconnu au chapitre cinq qu'il y avait lieu, par mesure de protection, d'autoriser les fouilles de personnes lors de l'arrestation, comme le permet actuellement le common law[499]. Par ailleurs, dans le même chapitre, nous avons formulé d'autres justifications permettant la saisie d'armes lorsque celles-ci constituent la preuve d'une infraction ou lorsque leur possession, dans les circonstances de l'espèce, constitue une infraction. Essentiellement, ces justifications reprennent les principes particuliers à la base du mécanisme de saisie sans mandat prévu aux articles 99 et 100 du code actuel, et du mandat de nature générale prévu à l'article 443. Toutefois, bien que ce dernier ne vise que les perquisitions dans les immeubles, nos recommandations, à l'instar des dispositions de l'article 99, visent également les fouilles de personnes et de véhicules. En outre, comme nous avons prévu que de telles fouilles peuvent avoir lieu sans mandat lorsque la vie humaine ou la sécurité sont en péril, il est peu probable qu'une fouille qui serait actuellement autorisée aux termes des articles 99 ou 100 ne puisse être justifiée au regard de nos recommandations.

424. On ne peut cependant pas en dire autant des pouvoirs prévus à l'article 101. Nous avons déjà expliqué que l'objectif de protection très large que l'on retrouve dans cette disposition n'avait pas sa place dans un ensemble de règles générales. En effet, dans la mesure où il ne constitue pas une réaction à la perpétration d'un crime, ce mécanisme ouvre la voie à l'incertitude et à l'arbitraire. Or, de tels risques sont-ils justifiés dans le cas des perquisitions visant des armes à feu? La réponse à cette question réside dans les deux objectifs poursuivis par les dispositions de l'article 101: l'application du droit pénal à court terme et la réglementation de la possession d'armes à long terme[500]. Nous ne croyons pas que le premier objectif puisse justifier la reconnaissance de motifs autres que ceux qui sont déjà admis par les règles générales. Quant au second objectif, bien qu'il soit défendable au regard des principes sous-jacents à la législation portant sur la santé et la sécurité en dehors du droit pénal, il ne justifie pas le libellé actuel des dispositions de l'article 101.

425. Le premier objectif consiste essentiellement dans la mise en œuvre d'une approche préventive au problème de la possession d'armes dangereuses. Le bien-fondé de cette approche a été défendu aussi bien dans la doctrine[501] que dans des mémoires soumis par les forces de police à des comités parlementaires[502]. En résumé, les défenseurs de cette approche soutiennent qu'il est légitime d'intervenir lorsqu'une arme à feu [TRADUCTION] «est sur le point d'être utilisée illégalement». Ce faisant, on oublie toutefois qu'il existe déjà des infractions consistant dans l'utilisation éventuelle d'une arme à feu à des fins illégales. Le *Code criminel* contient en effet des dispositions interdisant précisément la dissimulation d'une arme, l'utilisation d'une arme de manière négligente, le fait de braquer une arme à feu, la possession d'une arme à une assemblée publique, ainsi que la possession d'une arme dans un dessein dangereux ou à des fins illégales[503]. Dans ce dernier cas notamment, le législateur, soucieux d'assurer la protection des citoyens, réprime ce qui constitue en fait un acte criminel inchoatif. Outre les restrictions concernant l'usage d'armes à feu, un certain nombre de dispositions interdisent la possession illégale d'armes prohibées ou d'armes à autorisation restreinte[504]. En vertu de ces dispositions, l'agent de la paix qui est fondé à croire qu'une personne possède une arme en contravention de ces dispositions peut obtenir un mandat l'autorisant à perquisitionner afin de découvrir l'arme et de la saisir.

426. La question est donc claire. Quelles sont, outre l'illégalité de la possession de l'arme en cause, son utilisation négligente éventuelle, sa possession à des fins dangereuses ou illégales, ou encore le fait de l'arrestation, les raisons de «sécurité» pour lesquelles l'agent de la paix devrait être autorisé à rechercher et à saisir une arme? Les cas d'application des dispositions de l'article 101 nous fournissent la meilleure réponse à cette question.

427. Le premier rapport provisoire préparé à l'intention du Solliciteur général, au sujet de l'évaluation des mesures législatives canadiennes relatives au contrôle des armes à feu, a confirmé que l'on utilisait surtout le pouvoir de saisie sans mandat prévu au paragraphe 101(2), plutôt que le pouvoir de saisie avec mandat prévu au paragraphe 101(1). Le rapport énonce en outre ce qui suit:

> Les principales caractéristiques des situations qui ont donné lieu à des perquisitions exécutées en vertu des paragraphes 101(1) et 101(2) sont les suivantes: les personnes concernées, sans être des «criminels» en soi, font preuve d'instabilité émotive ou de violence dans des circonstances ou des lieux où les armes à feu sont facilement accessibles. Les perquisitions et saisies dans l'intérêt de la sécurité ont

> donc le plus souvent lieu à l'occasion de disputes familiales ou entre voisins .... Dans une ou deux régions, le paragraphe 101(2) a permis de faciliter les perquisitions dans le cas de «criminels» notoires ou présumés. Ces perquisitions ne contreviennent peut-être pas, d'un point de vue technique, aux dispositions du paragraphe. Mais s'il est exact que les paragraphes 101(1) et 101(2) ont été prévus pour les cas de «comportement dangereux» et non pas pour les situations «criminelles», on peut dire que ces perquisitions constituent un abus de l'esprit de l'article[505].

428. Les auteurs du rapport établissent ensuite une distinction entre les facteurs de sécurité liés au comportement d'une personne et ceux qui sont liés à sa réputation auprès de la police. Ils laissent entendre que les dispositions législatives en cause sont, à juste titre, centrées sur le comportement. Laissons de côté pour le moment la question de savoir si ces dispositions ont pour effet d'autoriser tacitement les perquisitions fondées sur des critères de réputation. Il convient plutôt de se demander si le comportement d'une personne peut effectivement justifier une fouille ou une perquisition pour des raisons de sécurité. En effet, dans quelle mesure un comportement qui ne constitue pas une infraction criminelle pourrait-il permettre à la police de porter atteinte aux droits d'une personne? Tout au long de la présente étude, nous avons adopté comme postulat que l'application du droit pénal devait constituer une réaction à la perpétration d'un crime, et que l'intérêt de l'application du droit pénal ne justifiait pas l'établissement du pouvoir de porter atteinte aux droits d'une personne à des fins purement préventives[506]. Or, devrait-on renoncer à cette position générale dans le contexte des perquisitions relatives aux armes à feu?

429. À notre avis, ce serait faire fausse route que de poser cette question en termes de prévention du crime. En effet, la nécessité d'empêcher les personnes déséquilibrées d'utiliser des armes à feu ne se limite pas à la prévention du *crime*, mais participe plutôt de la prévention des risques de *blessures*, qu'un *crime* ait été commis ou non. Cela étant admis, il devient évident que la justification des pouvoirs spéciaux de fouille, de perquisition et de saisie en matière d'armes à feu ne réside pas dans l'intérêt de l'application du droit pénal, mais plutôt dans la réglementation globale de la possession d'armes, soit le second objectif des dispositions de l'article 101. Cet objectif qui, en un sens, est celui dont la portée est la plus générale, est fondé sur des principes relativement récents de préservation de la santé et de la sécurité publique, et non pas sur la poursuite des buts traditionnels du droit pénal. En fait, l'évolution de la législation relative à la réglementation des armes à feu, au cours des cent

dernières années, a été marquée par l'intégration progressive de mécanismes à caractère normatif, comme les permis et les formalités d'enregistrement, à cette législation qui, à l'origine, était caractérisée essentiellement par la prohibition d'activités criminelles[507]. Bien que ces mécanismes aient été incorporés au *Code criminel*, il importe de reconnaître qu'ils ne constituent pas vraiment du «droit pénal». En effet, ils n'ont pas pour objet de prohiber certains actes, ni de condamner et de punir celui qui se rend coupable de l'infraction en cause. En réalité, tout comme les explosifs sont visés par la *Loi sur les explosifs*[508], l'acquisition, la possession et l'usage des armes à feu sont réglementés dans l'intérêt de la sécurité du public. Et si, dans la plupart des cas, cet intérêt correspond à celui de l'application du droit pénal, il n'en est pas toujours ainsi.

430. L'affaire *Re Thomson* constitue sans doute le meilleur exemple de saisie d'armes exécutée pour des motifs de santé et de sécurité[509]. En l'espèce, il s'agissait d'une grande quantité d'armes et d'explosifs cachés dans un vaste dépôt, et dont une partie seulement étaient possédés illégalement. Jugeant que la saisie était bien fondée, le juge Phillips de la Cour provinciale s'est appuyé, non pas sur le caractère illégal de certaines des choses saisies, mais sur des considérations d'ordre général liées au danger d'incendie dans le voisinage et au risque de vol des armes par suite de la divulgation de l'existence du dépôt par les media[510].

431. L'opportunité des dispositions de l'article 101, en tant que mécanisme de réglementation des armes à feu dépend, dans une certaine mesure, de l'opinion que l'on se fait de l'opportunité de la législation relative à la réglementation des armes à feu en général. Nous ne contestons pas le bien-fondé du postulat sous-jacent aux modifications de 1977, c'est-à-dire le caractère dangereux des armes à feu, ni le système de réglementation établi par suite de ces modifications. En revanche, il y a lieu de se demander si cette réglementation a vraiment sa place dans le *Code criminel*. D'un point de vue constitutionnel, la Cour d'appel de l'Alberta a décidé[511] qu'il était valide pour le Parlement fédéral d'adopter les dispositions de l'article 101 en vertu de sa compétence législative en matière de droit pénal prévue au paragraphe 91(27) de la *Loi constitutionnelle de 1867*. On remarquera que les aspects normatifs de la législation relative aux armes à feu, tout comme ceux de la législation concernant les explosifs, pourraient facilement être intégrés à un autre texte de loi. Toutefois, il ne nous appartient pas, dans le cadre du présent document, de faire des recommandations à cet égard. En effet, contrairement aux cas des publications obscènes et de la propagande

haineuse, les dispositions en cause établissent bien plus qu'un simple mécanisme de saisie *in rem*.

432. Si l'on accepte les objectifs et les dispositions à caractère «normatif» de la législation relative à la réglementation des armes à feu, les dispositions actuelles de l'article 101 concernant la perquisition et la saisie n'en restent pas moins fort discutables. Dans la mesure où les perquisitions exécutées en vertu de ces dispositions ne reposent pas sur les mêmes principes que les fouilles, les perquisitions et les saisies effectuées pour l'application du droit pénal, cette question devrait faire l'objet d'une étude distincte. Les remarques préliminaires qui suivent visent seulement à assurer que ces pouvoirs à caractère normatif ne soient pas transformés en un mandat général permettant aux agents de la paix de se livrer à des perquisitions arbitraires chez les personnes soupçonnées d'activités criminelles, pratique qui avait été signalée et critiquée dans le rapport provisoire préparé à l'intention du Solliciteur général.

433. Il importe de souligner que certains manuels de formation des policiers exhortent ces derniers à faire preuve de circonspection dans l'exercice de ces pouvoirs. Ainsi, le "Metropolitan Toronto Training Précis" énonce que [TRADUCTION] «ces dispositions peuvent être très utiles aux agents de police dans les situations trop urgentes pour qu'un mandat puisse être obtenu, lorsque le public est en danger». On y trouve néanmoins la mise en garde suivante: [TRADUCTION] «tous les agents doivent faire preuve d'une extrême prudence afin de ne pas abuser de ce pouvoir[512]». En outre, il est vrai que certaines forces de police semblent voir d'un œil méfiant les pouvoirs qui leur sont conférés par les dispositions de l'article 101, et enseignent à leurs membres que ces dispositions s'appliquent aux perquisitions et non aux fouilles de personnes. Par contre, des représentants d'autres forces de police rencontrés par les recherchistes de la Commission ont invoqué la nécessité d'effectuer des fouilles de personnes pour justifier le maintien de ces dispositions[513]. À tout le moins, il importe d'éclaircir la question de savoir s'il est légal de fouiller des personnes en vertu des dispositions de l'article 101. Cependant, la question fondamentale demeure la suivante: comment restreindre la portée de ces dispositions afin de respecter les limites des objectifs qui les sous-tendent? Nous formulons deux propositions à cet égard.

434. En premier lieu, le pouvoir de perquisition et de saisie devrait être attaché de plus près à la demande de confiscation *in rem*. Comme dans le cas des publications obscènes et de la propagande haineuse, la décision définitive qui est prononcée à l'audition de la

demande, c'est-à-dire l'élément essentiel de ce mécanisme à caractère normatif, a pour but de déterminer si la possession des objets en cause doit ou non être remise à la personne visée. Dans le cadre des mécanismes de confiscation *in rem* prévus aux articles 160 et 281.3, les pouvoirs de perquisition et de saisie devraient être considérés comme des pouvoirs de nature accessoire visant à mettre les objets saisis sous main de justice jusqu'à ce que la décision soit rendue. En conséquence, il importe de préciser que l'interdiction de possession dans l'intérêt de la sécurité réside dans la confiscation à long terme visée par l'ordonnance prévue au paragraphe 101(6), et non dans la perte de possession qui résulte de l'acte de l'agent de la paix. On remarquera par ailleurs que même si le procureur général est tenu de faire un rapport à un magistrat, cette formalité ne constitue pas l'amorce du mécanisme de confiscation *in rem*. Il faut pour cela qu'une autre demande soit présentée au magistrat en vertu des dispositions du paragraphe 101(4). À défaut de présentation d'une telle demande dans les trente jours, les choses saisies doivent être restituées. Ce démembrement du mécanisme permet à la police d'établir un système de réglementation parallèle. Elle peut en effet saisir des objets, les détenir temporairement, puis les remettre à leur propriétaire sans avoir recours au mécanisme à caractère normatif qui fait partie intégrante du processus de confiscation *in rem*. Cette disjonction du processus devrait être corrigée, et les pouvoirs de perquisition et de saisie, être liés directement à l'audition de la demande de confiscation *in rem*, comme dans le cas des articles 160 et 281.3.

435. En second lieu, les motifs de la perquisition et de la saisie devraient être fondés sur le critère de la croyance raisonnable que la personne visée a effectivement une arme en sa possession, sous sa garde ou sous son pouvoir. Ce critère était contenu implicitement dans le libellé de l'ancien article 105, qui permettait de saisir des armes, mais non de perquisitionner afin d'en trouver. Certes, il semble justifié de permettre à l'agent de la paix de perquisitionner en vue de trouver une arme possédée dans des circonstances dangereuses. Nous ne croyons pas pour autant qu'il faille aller jusqu'à sanctionner les perquisitions exécutées au hasard. Exposer une personne à de telles fouilles tout simplement parce que l'on estime qu'elle ne devrait pas avoir d'arme en sa possession reviendrait à cautionner une forme d'inspection qui s'inscrit mal dans le cadre d'un mécanisme *in rem*. Bien que celui-ci soit d'une nature essentiellement normative, il comporte de nombreuses caractéristiques analogues aux garanties liées au principe de la suprématie du droit et intégrées au droit pénal. Par exemple, la personne ne peut être

privée des objets saisis que dans la mesure où le magistrat détermine que ces objets font partie de la catégorie désignée. Dans le cas des articles 160 et 281.3, le caractère «réactif» du processus s'applique à l'étape de la perquisition et de la saisie. Ainsi, l'agent de la paix n'est pas autorisé à perquisitionner à seule fin de vérifier si une personne se trouve en possession d'objets faisant partie de la catégorie désignée. Il ne peut perquisitionner que s'il existe des motifs raisonnables de croire que la personne est effectivement en possession de tels objets. Il est permis de se demander pourquoi les perquisitions légitimes ne pourraient être autorisées, aux mêmes conditions, dans l'intérêt de la réglementation des armes à feu.

I. Le pouvoir d'entrer afin de prévenir le danger pour la vie

436. Bon nombre des recommandations que contient le présent document de travail portent sur l'aspect des pouvoirs de fouille, de perquisition et de saisie visant la protection de la vie humaine et de la sécurité[514]. Cependant, comme nous l'avons expliqué ci-dessus[515], les responsabilités de l'agent de police en tant que «gardien de la paix» débordent le cadre des fouilles, des perquisitions et des saisies. Comme notre propos se limite aux règles de droit régissant ces derniers pouvoirs, nous n'avons formulé aucune recommandation concernant le maintien ou la modification de ce rôle très ancien.

CHAPITRE DIX

L'application des règles

I. Introduction

RECOMMANDATIONS

47. Un mécanisme devrait être établi afin de sanctionner le principe suivant lequel la preuve illégalement obtenue est irrecevable au procès, lorsque son utilisation est susceptible de déconsidérer l'administration de la justice. Les détails de ce mécanisme seront élaborés dans un document de travail portant sur les mécanismes postérieurs à la saisie.

48. Les autorités compétentes devraient envisager la possibilité d'établir, aux niveaux provincial et local, des comités de juges et d'avocats chargés de surveiller le respect des exigences légales concernant les documents relatifs au mandat de perquisition.

437. La mise en application des règles de droit régissant les fouilles, les perquisitions et les saisies implique l'établissement de mécanismes tant sur le plan interne que sur le plan externe. Sur le plan interne, ces mécanismes d'application consistent à inciter les policiers et les personnes chargées de la délivrance des mandats, par l'entremise des institutions et des structures administratives dont ces derniers dépendent, à prendre conscience de ces règles et à les respecter. Il va sans dire qu'il serait plus avantageux d'atteindre ces objectifs sur le plan interne, dans la mesure où cela aurait pour effet de stimuler l'enthousiasme et la concertation parmi les autorités responsables et, ce qui importe plus encore, de prévenir la violation des règles de procédure plutôt que de la régler *a posteriori*[516].

438. Tout au long de cette étude, nous avons donné des exemples de mécanismes de contrôle applicables sur le plan interne, comme les cours de formation pour les policiers et les juges de paix, et nous n'avons pu qu'applaudir à ces initiatives[517]. Par ailleurs, la simple mise à jour des formules, à la lumière de la jurisprudence applicable, constitue un effort souhaitable dans la mesure où elle contribue à assurer que les activités de la police sont conformes aux nouvelles règles de droit. Il est encourageant de constater que certaines forces de police et certains greffes des tribunaux accordent une importance accrue au contrôle de la légalité de leurs pratiques. Cependant, le nombre élevé d'irrégularités révélées par les études de la Commission montrent la nécessité d'aller plus loin que le simple renforcement des mécanismes de contrôle internes. La question qui se pose est la suivante: que doit-on faire lorsque les mécanismes d'application internes ne donnent pas les résultats escomptés? Cela nous amène à parler des mécanismes de contrôle applicables sur le plan externe.

439. En principe, la personne qui a été fouillée ou dont le véhicule ou la maison ont fait l'objet d'une perquisition peut procéder de façons trois différentes pour contester la légalité de la fouille, de la perquisition ou de la saisie[518]. Premièrement, si une saisie a eu lieu, la personne peut s'adresser au tribunal pour contester le droit de la police de retenir les choses saisies ou de les utiliser aux fins de l'enquête ou de la preuve. Deuxièmement, la personne peut intenter des poursuites sur le plan criminel ou sur le plan disciplinaire contre la personne qui a délivré le mandat ou celle qui l'a exécuté. Troisièmement, la personne qui s'estime lésée peut s'adresser aux tribunaux civils afin d'obtenir des dommages-intérêts. Avant les développements récents en matière constitutionnelle, cependant, à cause des contraintes d'ordre théorique et d'ordre pratique qui caractérisaient ces recours, ceux-ci constituaient rarement un remède efficace pour la personne lésée et n'offraient que peu de protection aux citoyens contre les actes attentatoires de la police.

440. Cela étant dit, les dispositions de l'article 24 de la *Charte canadienne des droits et libertés* pourraient bien modifier considérablement cet état de choses. En voici la teneur:

> (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
>
> (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions

qui portent atteinte aux droits ou aux libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Il faudra bien sûr attendre que les tribunaux se prononcent sur la portée et la signification exacte de ces dispositions. Elles posent néanmoins un certain nombre de limites bien définies qui ne sont pas étrangères à notre analyse.

441. Il est évident que ces dispositions n'ont pas pour but d'assurer le respect de toutes les règles régissant les pouvoirs de fouille, de perquisition et de saisie. Elles entrent plutôt en jeu dès lors que les droits et libertés garantis par la *Charte* ont été violés. Dans le contexte des fouilles, des perquisitions et des saisies, la violation des droits et libertés constitutionnels correspond aux «fouilles, perquisitions et saisies abusives» dont il est question à l'article 8 de la *Charte*[519]. Par ailleurs, les dispositions de l'article 24 n'énoncent pas non plus tous les mécanismes d'application possibles. Si elles sanctionnent le droit du citoyen de s'adresser au tribunal compétent pour obtenir réparation, elles ne semblent pas tenir compte du recours aux règles internes de discipline, ni des poursuites pénales qui peuvent être intentées contre quiconque a violé les droits garantis par la *Charte*. Enfin, dans la mesure où elles traitent de la violation des droits individuels, ces dispositions ne visent pas les mécanismes d'application à caractère normatif et de portée plus générale.

442. En conséquence, les commentaires qui suivent ne sont pas limités au cadre établi par les dispositions de l'article 24 de la *Charte*. Nous étudierons plutôt la question en trois parties: (1) les façons traditionnelles de contester les fouilles, les perquisitions et les saisies, au moyen des recours civils et pénaux, ainsi que des plaintes disciplinaires; (2) la procédure relative à la règle d'exclusion et à la restitution des choses saisies; et (3) la surveillance sur le plan normatif.

II. Les recours traditionnels

443. Les principaux recours traditionnels qui s'offrent à la personne lésée par une fouille, une perquisition ou une saisie sont les poursuites criminelles et civiles, de même que les plaintes

disciplinaires. (Bien que les brefs de prérogative fassent également partie des recours traditionnels, nous les examinerons dans la prochaine section, dans le contexte des questions de l'exclusion et de la restitution, auxquelles ils sont liés dans une certaine mesure.) Les problèmes qui se posent lorsque ces recours traditionnels sont utilisés contre les agents de police chargés de l'application du droit pénal ne sont pas particuliers au domaine des fouilles, des perquisitions et des saisies. Des allégations de violence survenues notamment dans des cas d'arrestations et d'interrogatoires de personnes sous garde ont récemment fait couler beaucoup d'encre[520]. Nous n'avons pas tenté d'apporter des solutions à ces divers problèmes, d'une part parce que ceux-ci débordent le propos du présent document de travail et, d'autre part, parce que nous ne sommes pas sûrs que les solutions à ces difficultés constituent des remèdes efficaces pour les problèmes qui caractérisent les fouilles, les perquisitions et les saisies de façon plus générale. Par conséquent, si nous examinons les recours traditionnels, c'est surtout afin de démontrer qu'il y a lieu d'instaurer d'autres mécanismes d'application.

A. Les poursuites pénales

444. Les poursuites pénales sont surtout utilisées lorsque l'on conteste la légalité des actes de la police. Les seules dispositions qui semblent permettre de poursuivre un juge de paix pour avoir délivré un mandat de perquisition illégal semblent être celles de l'article 115 du *Code criminel*, dont voici la teneur:

> À moins qu'une peine ou un châtiment ne soit expressément prévu par la loi, quiconque, sans excuse légitime, contrevient à une loi du Parlement du Canada en accomplissant volontairement une chose qu'elle défend ou en omettant volontairement de faire une chose qu'elle prescrit, est coupable d'un acte criminel et passible d'un emprisonnement de deux ans.

On a eu recours aux dispositions de cet article dans l'affaire *R.* c. *Coutellier, Cobb et Cormier*[521], afin de poursuivre des agents de police qui avaient exécuté illégalement une perquisition sans mandat. Sans doute le principe qui se dégage de cette décision pourrait-il être appliqué lorsqu'un juge de paix contrevient volontairement à une exigence relative à la délivrance des mandats de perquisition.

445. En revanche, l'éventail d'infractions dont un agent de police pourrait éventuellement être accusé relativement à l'exécution d'une fouille, d'une perquisition ou d'une saisie illégale est beaucoup plus large. Outre les dispositions relatives aux voies de fait et à l'infraction qui consiste à infliger des lésions corporelles, lesquelles seraient applicables aux cas d'emploi injustifié de la force, le *Code criminel* contient un certain nombre d'infractions relatives à l'administration de la justice qui sont liées à la conduite de l'agent de la paix. Parmi les dispositions applicables figurent celles de l'article 120 (parjure lors d'une procédure judiciaire), celles de l'article 122 (fausse déclaration faite sous serment), et celles de l'article 117 (prévarication dans l'exécution d'actes judiciaires ou présentation de faux rapports). Cependant, comme il s'agit d'actes criminels dans tous les cas, la personne lésée se trouve devant une difficulté pratique. En effet, la Couronne conserve le droit absolu d'intervenir dans toute poursuite relative à un acte criminel.

446. Comme on l'a fait remarquer, il est souvent difficile de poursuivre les agents de police, d'une part, à cause de la solidarité qui existe naturellement entre les policiers et, d'autre part, parce qu'il arrive parfois que l'acte reproché soit conforme aux pratiques habituelles d'un service donné[522]. De fait, il est rare que des poursuites pénales soient intentées contre des agents de police relativement à des perquisitions exécutées en vertu d'un mandat. En 1973, Spiotto[523] a observé que même s'il n'existait aucun obstacle théorique à cet égard, on n'avait pas eu recours aux poursuites pénales en Ontario, dans le contexte des fouilles, des perquisitions et des saisies illégales, depuis le début des années 1940. Or, ces résultats confirment les statistiques nationales que la Commission a obtenues récemment en ce qui a trait à la G.R.C. Pour les années 1978 et 1979 réunies, seulement cinq poursuites ont été intentées contre des agents de la G.R.C. pour voies de fait commises lors de perquisitions, mais chacune de ces perquisitions avait été exécutée sans mandat. Dans chaque cas, l'agent a été acquitté. Peut-être les accusations étaient-elles mal fondées. Quoi qu'il en soit, ces résultats montrent à quel point il est difficile de faire condamner un agent de la paix[524]. Et même lorsqu'un agent est trouvé coupable à la suite d'une accusation relative à l'exécution d'une perquisition, la sentence est habituellement mineure. Ainsi, dans l'affaire *Ella Paint*, la Cour d'appel a recommandé une peine «symbolique»[525]. Qui plus est, dans l'affaire *Coutellier, Cobb et Cormier*, les agents de police qui avaient exécuté illégalement une perquisition sans mandat ont bénéficié d'une libération inconditionnelle[526].

B. La plainte disciplinaire

447. Au lieu de déposer une accusation criminelle contre l'agent de la paix, une personne peut adresser une plainte aux autorités de la force de police elle-même. Celles-ci peuvent alors donner réparation à la personne lésée ou prendre des mesures disciplinaires[527]. Pourtant, du moins dans le cas de la G.R.C., le nombre de plaintes paraît relativement faible par rapport au nombre de fouilles, de perquisitions et de saisies auxquels les membres de cette force se livrent. Pendant les six mois faisant l'objet d'une étude effectuée par celle-ci en 1979, vingt-six plaintes ont été déposées relativement à des fouilles et à des perquisitions. Dans le cas des saisies, le nombre de plaintes n'est que de dix-huit. Et même lorsque l'on a jugé opportun de donner suite aux plaintes, l'enquête s'est déroulée avec le moins de formalisme possible. Ainsi, ce n'est que dans sept cas relatifs à des perquisitions et dans un cas de saisie que l'agent a requis l'assistance d'un avocat[528]. Dans une étude portant principalement sur la ville de Toronto, Spiotto a fourni, en 1973, des données qui montrent également la très faible fréquence des plaintes en matière de fouilles, de perquisitions et de saisies[529].

448. Dans le rapport Marin, publié en 1976, on a reconnu que les personnes qui s'estimaient lésées par suite des activités de la G.R.C. ne faisaient pas toutes les démarches nécessaires au dépôt d'une plainte. On a donné quatre raisons pour expliquer cet état de choses:

- l'individu ne savait pas comment porter la chose à l'attention de la Gendarmerie;
- on pensait qu'il «servait à rien» de se plaindre, étant donné que la Gendarmerie tenterait simplement de cacher les faits;
- on craignait que la Gendarmerie exerce quelque forme de représailles par suite de la plainte;
- des tiers à qui on avait demandé conseil ne recommandaient pas de pousser plus loin l'affaire[530].

Certes, il est délicat d'établir une règle générale à partir de constatations relatives à une seule force de police. Toutefois, certains observateurs prétendent que les préoccupations formulées dans le rapport Marin s'appliquent également à d'autres forces[531].

C. Le recours civil

449. En common law, on a toujours considéré que les fonctionnaires judiciaires étaient responsables des dommages résultant de leurs actes illégaux. On a toutefois tenu compte des difficultés auxquelles font face les personnes investies d'un pouvoir décisionnel judiciaire. Par exemple, dans l'affaire *Cave* v. *Mountain*, la Cour a établi une distinction entre l'absence de juridiction, qui engage la responsabilité de la personne en cause, et l'erreur de jugement, dont cette personne ne peut être tenue responsable[532]. De nos jours, cependant, les tempéraments apportés par diverses dispositions législatives tant fédérales que provinciales ont rendu fort complexe l'application de ce principe du common law.

450. Les premières dispositions fédérales qu'il convient de citer sont celles de l'article 717 du *Code criminel*. Elles entrent en jeu lors de la présentation d'une demande visant à annuler un mandat de perquisition. En voici la teneur:

> Lorsqu'une demande est présentée en vue de l'annulation d'une condamnation, ordonnance ou autre procédure faite ou maintenue par un ... juge de paix pour le motif qu'il a outrepassé sa juridiction, la cour ou le juge à qui la demande est présentée peut, en annulant la condamnation, ordonnance ou autre procédure, ordonner qu'aucune procédure civile ne sera prise contre le juge de paix ... ou contre un fonctionnaire qui a agi en vertu de la condamnation, ordonnance ou autre procédure, ou aux termes de tout mandat décerné pour son application.

Le libellé de cet article montre qu'il s'agit de dispositions facultatives conférant au tribunal un pouvoir discrétionnaire. Il semble toutefois, d'après la jurisprudence récente, que l'ordonnance en question soit accordée presque automatiquement lors de l'annulation d'un mandat de perquisition, à telle enseigne qu'on en est venu à la qualifier d'«habituelle»[533]. À cet égard, l'exemple le plus étonnant est sans doute l'affaire *Den Hoy Gin*, dans laquelle l'agent de police avait déposé une fausse dénonciation sous serment. Malgré tout, la Cour d'appel de l'Ontario a accordé l'ordonnance d'immunité[534]. En revanche, dans l'affaire *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, la Cour suprême de la Colombie-Britannique a refusé d'accorder l'immunité à l'agent de police qui avait exécuté la perquisition. De l'avis de la Cour, l'ordonnance en question ne devrait être prononcée que lorsque la preuve ne montre aucune trace de mauvaise foi ou d'arrière-pensée

de la part de la police, ni d'irrégularités dans l'exécution de la saisie[535].

451. Outre l'immunité qu'offrent les dispositions de l'article 717, la responsabilité de l'agent de la paix exécutant un mandat de perquisition est limitée par les dispositions du paragraphe 25(2), dont voici la teneur:

> Lorsqu'une personne est, par la loi, obligée ou autorisée à exécuter un acte judiciaire ou une sentence, cette personne ou toute personne qui l'assiste est, si elle agit de bonne foi, fondée à exécuter l'acte judiciaire ou la sentence, même si l'acte judiciaire ou la sentence est défectueuse ou si elle a été émise ou imposée sans juridiction ou au-delà de la juridiction.

Le critère de bonne foi qui caractérise ces deux textes est pour ainsi dire le même dans les deux cas. La différence entre ces dispositions réside plutôt dans leurs contextes d'application respectifs. Les dispositions de l'article 717 ne peuvent s'appliquer que lors d'une demande présentée avant le procès, alors que l'on peut invoquer celles du paragraphe 25(2) au cours du procès civil. Toutefois, ni l'un ni l'autre de ces textes ne semble décharger l'agent de la paix de la responsabilité découlant d'un acte non autorisé par le mandat.

452. Les juges de paix et les agents de la paix sont des fonctionnaires nommés par les gouvernements provinciaux. C'est pourquoi les provinces ont pris elles-mêmes les mesures nécessaires afin d'établir les règles d'immunité. Or, l'approche adoptée par les provinces diffère quelque peu de la position du common law. Certaines provinces ont maintenu la distinction entre l'erreur judiciaire commise par une personne dans les limites de sa compétence, et l'erreur liée à la compétence elle-même[536]. D'autres provinces ont accordé une protection générale aux juges de paix, pour autant que ceux-ci aient exercé de bonne foi leurs pouvoirs décisionnels[537].

453. D'aucuns prétendent que la possibilité pour les citoyens de s'adresser aux tribunaux civils constitue une solution équilibrée, en tant que méthode d'application des règles de conduite des policiers. Selon cet argument, le droit de la responsabilité délictuelle et quasi délictuelle [TRADUCTION] «laisse au citoyen le soin de décider s'il a subi un préjudice suffisamment grave, par suite d'un tel abus, pour affronter les problèmes et les frais qu'implique la procédure visant à imposer au défendeur la sanction appropriée[538]». Toutefois, cet argument ne tient pas compte des contraintes que comporte ce processus. Celles-ci sont tellement lourdes qu'elles ont souvent pour

effet de décourager même la personne la plus déterminée. Outre les exigences de la loi et les frais judiciaires qui peuvent être considérables, il est souvent très difficile de déterminer la valeur des dommages. En effet, lorsque l'acte des policiers constitue une atteinte grave à la vie privée et à la dignité, sans toutefois causer un préjudice physique ou matériel important, il est très difficile pour la victime d'être indemnisée de façon satisfaisante, surtout lorsqu'elle appartient à un groupe économique ou social ayant une mauvaise réputation aux yeux du jury[539].

454. Encore une fois, les statistiques produites par la G.R.C. montrent que très peu de recours civils sont intentés dans de tels cas. Ainsi, au cours des années 1978 et 1979, six demandes ont été adressées aux tribunaux civils relativement à des perquisitions avec mandat, et six autres demandes ont été intentées concernant d'autres types de perquisitions[540]. Les demandes étaient basées notamment sur l'invalidité du mandat, l'exécution illégale de celui-ci et la violation du secret professionnel de l'avocat. Cependant, ces données statistiques ne comprennent pas les demandes d'indemnisation faisant suite à des perquisitions légales, par exemple lorsqu'une porte est brisée légalement lors d'une perquisition en matière de stupéfiants ou de drogues, demandes qui sont plus fréquentes. Comme dans de tels cas, la légalité de l'acte n'est pas mise en doute (du reste, on considère généralement que l'indemnisation est accordée à titre gracieux), le recours civil n'a pas vraiment pour but d'assurer l'application des règles relatives aux fouilles, aux perquisitions et aux saisies. En réalité, le fait que les recours civils visent plus souvent les dommages matériels que le caractère illégal de l'acte semble montrer que le recours délictuel est plus approprié aux dommages matériels et économiques qu'aux préjudices plus abstraits. Cette fois encore, les constatations de la Commission confirment les recherches antérieures de Spiotto, qui avait conclu que [TRADUCTION] «lorsque l'acte illégal en cause est lié à une perquisition ou à une saisie illégales, très peu de recours [délictuels ou quasi délictuels] semblent avoir été intentés[541]».

D. La nécessité de nouvelles solutions

455. Il est bien reconnu que l'on a rarement recours aux poursuites criminelles ou civiles, ou aux plaintes disciplinaires afin de contester la validité des règles de droit relatives aux fouilles, aux perquisitions et aux saisies. Dès le début des années 1970, ce fait était

admis par les policiers et les avocats de la Couronne, comme l'indiquent les études de Spiotto[542]. Pour expliquer cet état de choses, on a souvent prétendu qu'étant donné la formation poussée des personnes chargées de l'application de la loi (c'est-à-dire l'efficacité des mécanismes d'application sur le plan interne), celles-ci commettent, en fait, très peu d'illégalités[543]. Cependant, à la lumière des preuves tendant à démontrer qu'en réalité, les règles ne sont pas suivies, nous sommes d'avis que la véritable raison de l'absence de contestation est beaucoup plus troublante: le droit canadien n'offre aucun recours approprié contre les actes attentatoires des policiers.

456. Sans doute le problème tient-il en partie à la lourdeur des mécanismes actuels. Il ne fait aucun doute qu'il y aurait lieu d'améliorer grandement les règles de procédure pénales, civiles et disciplinaires, afin de rendre ces recours plus accessibles aux personnes lésées. En matière civile, par exemple, les honoraires d'avocats devraient être remboursés intégralement à la partie privée, et l'on devrait établir des indemnités minimales en cas d'usage illégal des pouvoirs de la police[544]. De même, l'ordonnance d'immunité prévue à l'article 717 du *Code criminel*, qui à l'heure actuelle, est accordée pour ainsi dire automatiquement, devrait pouvoir être débattue par les parties dans le cas où le mandat serait annulé, de façon à ne plus faire obstacle aux recours ultérieurs contre les personnes ayant participé au processus de délivrance et d'exécution du mandat. On devrait également établir des règles visant à assurer l'objectivité et l'efficacité des poursuites dirigées contre les agents de police, afin que le dépôt d'une accusation criminelle ne soit plus considéré comme une démarche inutile pour l'application des règles relatives aux fouilles, aux perquisitions et aux saisies. Pourtant, il est permis de se demander si de telles améliorations constituent vraiment une solution au problème qui est à l'origine de la crise actuelle.

457. Le fait que les solutions actuelles ne soient pas utilisées pour l'application des règles relatives aux fouilles, aux perquisitions et aux saisies est sans doute lié davantage à la façon dont les règles sont violées qu'à la validité des solutions elles-mêmes. En effet, parmi les illégalités relevées lors des études de la Commission, rares sont celles qui constituent des abus de pouvoir manifestes. Lorsque l'agent de la paix exécute régulièrement une perquisition en vertu d'un mandat défectueux, ou fouille de façon consciencieuse une personne qu'il n'a pas le droit de fouiller, le dommage économique ou matériel causé n'est pas nécessairement grave. Or, en l'absence de préjudice grave, la personne qui a été fouillée ou dont les locaux ont été fouillés peut ne pas avoir conscience de l'illégalité de l'acte de la police. Comme certains auteurs l'ont fait remarquer, les Canadiens

ont souvent tendance à tenir pour acquis que les actes des représentants de l'autorité comme les agents de la paix sont légitimes[545]. Ainsi, lorsque l'illégalité réside uniquement dans une distinction légale ou dans l'appréciation d'un document, la personne ne subit en réalité aucun abus manifeste pouvant l'inciter à contester la justification de l'atteinte portée à ses droits.

458. On pourrait donc prétendre que les illégalités plus subtiles qui peuvent avoir lieu au cours du processus de délivrance et d'exécution du mandat sont moins préjudiciables que les atteintes violentes aux droits individuels et qu'en conséquence, elles devraient être sanctionnées de façon moins rigoureuse. Quoi qu'il en soit, cela ne justifie pas le laxisme qui caractérise actuellement l'application des règles de procédure. En réalité, le fait que les recours actuels soient définis directement en termes de faute et de perte individuelle constitue la source même du problème. En effet, les dommages résultant des illégalités habituelles sur le plan de la procédure ne constituent pas un préjudice déterminable auquel les poursuites civiles ou criminelles puissent apporter un remède approprié. Ils sont plutôt liés à des valeurs à la fois abstraites et impalpables, à savoir les valeurs inhérentes au principe de la suprématie du droit qui sous-tend notre système d'application du droit pénal.

459. Si tant est que l'on accepte la nécessité de réaffirmer le système d'application du droit pénal dont les règles permettent de porter atteinte aux droits individuels, il importe de chercher des solutions appropriées au-delà des remèdes traditionnels. La première consiste à élaborer des règles de procédure efficaces en vue de sanctionner la règle d'exclusion énoncée à l'article 24 de la *Charte*. La seconde consiste à établir des mécanismes à caractère normatif afin de surveiller et d'encourager l'observation des règles par la police.

III. La règle d'exclusion et la restitution des choses saisies

A. Avant la *Charte*

460. Avant l'adoption de la *Charte canadienne des droits et libertés*, les brefs de prérogative et règles de preuve du common law

constituaient les moyens dont disposait la personne visée par une saisie pour obtenir la restitution des choses saisies. Ces moyens comportaient toutefois des limites importantes. Suivant la décision de la Cour suprême du Canada dans l'affaire *Wray*, les éléments de preuve pertinents qui avaient été obtenus illégalement ne pouvaient être exclus que s'ils étaient fortement préjudiciables à l'accusé, si leur recevabilité était douteuse, et si leur valeur probante était insignifiante. Bien que la demande de bref de prérogative soit reconnue depuis longtemps comme une façon de contester la validité d'une saisie exécutée en vertu d'un mandat, l'utilité de ce mécanisme pour la restitution des choses saisies n'a jamais été clairement établie. Afin d'analyser cette question, il convient de brosser un tableau de l'état du droit antérieur à l'adoption de la *Charte*.

461. Dans l'affaire *Kehr*, on avait décidé que puisque la délivrance du mandat de perquisition était un processus de nature judiciaire, elle pouvait être révisée par une cour supérieure au moyen d'un bref de *certiorari*[547]. Au cours des soixante-dix dernières années, ce mécanisme a été simplifié, de sorte que de nos jours, la demande est appelée tout simplement «demande d'annulation». Toutefois, les pouvoirs et le rôle du tribunal chargé de la révision sont restés essentiellement les mêmes. Voici les trois motifs sur lesquels les cours supérieures se sont appuyées, de façon générale, afin de justifier leurs interventions dans le processus de délivrance: le caractère défectueux de la dénonciation enlevait au juge de paix toute compétence pour délivrer le mandat de perquisition; le juge de paix n'a pas exercé son pouvoir discrétionnaire de façon judiciaire; le mandat de perquisition délivré n'était pas conforme aux exigences légales. De fait, ces motifs ont permis aux tribunaux chargés de la révision d'annuler les mandats dans tous les cas, sauf peut-être les cas de vices de forme tout à fait anodins.

462. Par ailleurs, le pouvoir du tribunal chargé de la révision de se prononcer sur la restitution ou la confiscation des choses saisies en vertu d'un mandat déclaré illégal est une question épineuse à laquelle le droit canadien n'a jamais su répondre. Même si dans l'affaire *Bergeron*[548], la Cour suprême du Canada a décidé qu'une cour supérieure pouvait, accessoirement à l'annulation du mandat, ordonner la restitution des choses saisies à leur propriétaire, elle s'est toutefois abstenue de statuer sur la question de savoir si le tribunal pouvait prononcer une ordonnance permettant à la Couronne de retenir les choses nécessaires aux fins de la preuve, malgré l'annulation du mandat autorisant la saisie. Une telle ordonnance avait pourtant été prononcée dans l'affaire *Black*[549], mais la Cour

suprême a établi une distinction entre cet arrêt et l'affaire *Bergeron*. Par ailleurs, dans l'affaire *Alder*, le juge Moshansky avait pris position contre la décision rendue dans l'affaire *Black* et avait fait le commentaire suivant: [TRADUCTION] «... permettre à la police de conserver certains objets saisis illégalement en vertu d'un mandat de perquisition défectueux qui a par la suite été annulé revient selon moi à tourner la justice en dérision[550]». Pourtant, depuis l'affaire *Bergeron*, bon nombre de tribunaux ont rendu des ordonnances semblables à celle qui avait été prononcée dans l'affaire *Black* et la Cour suprême du Canada a récemment refusé de revenir sur cette question[551].

463. Récemment encore, d'après les règles du droit canadien relatives aux fouilles, aux perquisitions et aux saisies, la demande d'annulation constituait la principale façon de contester la détention de choses saisies illégalement. Cela avait pour effet de favoriser la personne lésée dans les cas où les objets litigieux avaient été saisis en vertu d'un mandat, et encore plus lorsque l'illégalité était liée à la délivrance du mandat plutôt qu'à l'exécution de celui-ci. Cette position a toutefois été assouplie dans deux décisions récentes provenant de la Colombie-Britannique, à savoir les affaires *Capostinsky* et *Butler*.

464. Dans l'affaire *Capostinsky*[552], le demandeur a présenté une demande de main-levée de saisie, afin d'obtenir la restitution d'échantillons de sang qui avaient été prélevés par un médecin sans son consentement et qui, par la suite, avaient été saisis par la police en vertu d'un mandat de perquisition. En l'espèce, le juge Berger a jugé que le mandat était nul, dans la mesure où il n'énonçait aucune infraction connue en droit, et a ordonné la restitution des échantillons de sang, invoquant à cette fin deux sources d'autorité distinctes: le pouvoir inhérent à celui d'annuler le mandat, et l'application des règles de la main-levée de saisie. Se réclamant de cette décision, la Cour suprême de la Colombie-Britannique a jugé qu'elle pouvait ordonner la restitution d'objets saisis illégalement sans mandat dans l'affaire *Butler*[553]. En l'espèce, la Cour a exercé le pouvoir inhérent à celui d'annuler le mandat afin d'ordonner la restitution des objets personnels saisis lors de l'arrestation des requérants.

465. Outre les recours susmentionnés, on trouve dans la législation un certain nombre de mécanismes permettant à une personne de recouvrer des objets saisis par la police: les paragraphes 101(4), 160(2), 281.3(2) et 446(1) du *Code criminel*, le paragraphe 10(5) de la *Loi sur les stupéfiants* et le paragraphe 37(5) de la *Loi des*

aliments et drogues. Cependant, comme ces mécanismes ont pour objet de déterminer la validité de la *détention* continue des objets, et non la légalité de la *saisie*, ils ne peuvent être considérés comme des mécanismes d'application régissant l'exercice des pouvoirs de la police. Nous étudierons ces mécanismes de façon détaillée dans un document de travail portant sur les mécanismes postérieurs à la saisie. Ce document traitera des règles permettant de déterminer la recevabilité des choses illégalement saisies, ainsi que des règles nécessaires à assurer la restitution de ces choses, la préservation de la preuve et la confiscation des biens dont la possession est illégale.

466. Les mécanismes actuels comportent une autre limite dans la mesure où même lorsque la demande d'annulation et de restitution est accueillie, les policiers peuvent subséquemment obtenir l'autorisation de saisir les mêmes objets. Au cours de discussions, tant les avocats de la Couronne que ceux de la défense ont cité de nombreux arguments pour justifier le recours à cette solution, à savoir: invoquer le succès de la première demande afin de forcer la Couronne à transiger relativement au plaidoyer, obtenir une décision préliminaire sur la question de la légalité avant d'intenter des poursuites civiles, utiliser la décision confirmant la légalité de la saisie afin de contester l'extradition aux États-Unis, et discréditer les policiers aux yeux du jury en montrant que les preuves qu'ils fournissent ont été obtenues, du moins en partie, par des moyens illégaux.

467. En revanche, les personnes consultées se sont montrées peu enthousiastes à l'idée que la demande puisse effectivement avoir les effets pour lesquels elle avait censément été conçue: annuler l'acte accompli illégalement. En effet, les décisions telles que *Black*[554] ont rendu cette éventualité fort peu probable. De fait, dans certains cas, la Couronne est même allée jusqu'à admettre l'illégalité du mandat devant le tribunal saisi de la demande de révision, pour ensuite produire des éléments de preuve démontrant que les objets saisis avaient une valeur probante. Même s'il témoigne du réalisme et de la sagacité des procureurs de la Couronne dans l'évaluation des documents relatifs au mandat, le fait qu'il soit possible de procéder de cette façon a enlevé à la cour supérieure son rôle de surveillance lors de la demande d'annulation et a restreint la tâche de celle-ci à examiner les questions de nécessité inhérentes au processus de restitution. Toutefois, cet état de choses pourrait bien avoir été profondément modifié par l'adoption des dispositions de l'article 24 de la *Charte*.

B. La *Charte* et la restitution des choses saisies

468. Jusqu'à maintenant, les tribunaux n'ont fait qu'aborder la question des effets des dispositions de l'article 24 de la *Charte* sur la restitution des choses saisies et sur les règles de recevabilité de la preuve. Il va sans dire que ces dispositions n'offrent aucun recours à moins que les droits constitutionnels du requérant n'aient été violés. Le cas échéant, cependant, les dispositions du paragraphe 24(1) permettent au tribunal compétent d'accorder la réparation qu'il estime juste et appropriée, c'est-à-dire, dans les cas qui s'y prêtent, la restitution des choses saisies en contravention des droits constitutionnels du propriétaire. En outre, les dispositions du paragraphe 24(2) autorisent expressément le tribunal à exclure un élément de preuve si l'utilisation de celui-ci «est susceptible de déconsidérer l'administration de la justice». Même si les conditions d'application de ces dispositions restent encore à déterminer, la Commission estime qu'il est opportun de proposer des mécanismes permettant de contester la légalité de la saisie, de la détention des choses saisies, ainsi que de la recevabilité des éléments de preuve saisis. Toutefois, comme ces questions sont liées directement à la restitution et à la confiscation de choses saisies, nous préférons attendre et formuler nos recommandations à ce sujet dans le document de travail portant sur les mécanismes postérieurs à la saisie.

IV. L'établissement de comités de surveillance

469. Une règle d'exclusion satisfaisante peut certainement contribuer à établir un système d'application du droit dont les limites correspondraient aux règles définissant les pouvoirs légaux qu'il comporte. Toutefois, quelle que soit la valeur d'une telle règle sur le plan «normatif», il n'est pas sûr qu'elle puisse, en soi, assurer l'application efficace et uniforme des règles de ce système. En effet, l'ordonnance d'exclusion est essentiellement un remède ponctuel accordé par suite d'un incident ou d'un acte illégal particulier. Par ailleurs, comme tout autre remède, son application dépend de l'initiative de la personne lésée et de la volonté du tribunal. Le pouvoir de contrôle que l'on associe à cette règle repose essentiellement sur le postulat voulant que la possibilité d'exclure un élément de preuve ait des effets dissuasifs à l'égard des actes illégaux

de la part de la police. Or, de nos jours, ce postulat est fortement contesté. Aux États-Unis, par exemple, si la règle d'exclusion applicable a déjà été considérée comme un facteur dissuasif[555], l'efficacité de celle-ci à cet égard a été mise en doute tant par la jurisprudence récente[556] que dans les études empiriques[557]. Par ailleurs, dans la mesure où le non-respect des critères légaux est imputable aux personnes chargées de la délivrance des mandats, le concept de dissuasion est inapplicable. En effet, le juge de paix n'a en principe aucun intérêt dans l'issue de l'enquête policière et de la poursuite. Par conséquent, si l'on doit avoir recours à des mécanismes de contrôle externes pour appliquer des règles relatives aux fouilles, aux perquisitions et aux saisies, il est nécessaire d'envisager d'autres mécanismes que la règle d'exclusion.

470. Il convient, en réalité, d'examiner la question du contrôle dans une optique plus large, et de ne pas se limiter aux variantes des remèdes actuels qui pourraient être appliquées suivant les circonstances de chaque cas. En effet, le problème de l'illégalité dans le domaine des fouilles, des perquisitions et des saisies est plus que la somme des conflits individuels soumis aux tribunaux. En fait, il soulève la question du bien-fondé des méthodes pratiques de la police et des organismes judiciaires dans leur ensemble. Les résultats de l'enquête de la Commission sur le mandat ont illustré clairement la diversité de ces méthodes, notamment le caractère détaillé des documents rédigés à Vancouver, par opposition au laconisme des documents provenant de Montréal. Afin de remédier à ces disparités, il importe de trouver des moyens de régir les méthodes de ces organismes de façon globale.

471. Il est généralement admis que les mécanismes de contrôle externes les plus efficaces, en ce qui concerne la police, sont ceux qui contribuent à renforcer les mécanismes de nature interne. Comme l'a souligné un auteur,

> [TRADUCTION]
> ... les mécanismes de contrôle externes doivent être conçus de façon à renforcer le système de discipline interne qui reste l'outil fondamental à cet égard. Ils ne doivent pas viser les transgressions individuelles, mais bien les facteurs qui rendent possibles ces actes illégaux[558].

Bien qu'il existe un grand nombre de solutions qui méritent d'être étudiées, nous proposons l'adoption d'une mesure dont les effets sur le contrôle des activités de la police pourraient être bénéfiques.

472. Nous recommandons la création de comités formés de représentants de la magistrature et de la section pénale du Barreau,

dont le mandat permanent consisterait à examiner la validité et la légalité des documents relatifs au mandat de perquisition dans les diverses régions du Canada. Ce contrôle, qui aurait notamment pour objet la légalité de la dénonciation et du mandat, pourrait également viser le rapport postérieur à l'exécution du mandat, de même que le procès-verbal de saisie. En somme, ces comités seraient chargés de poursuivre les fonctions remplies par le comité des juges auquel nous avons eu recours dans le cadre de la présente étude. À l'exemple de l'échantillon choisi pour le comité des juges, les documents soumis à ces comités pourraient être prélevés au hasard. Les constatations des comités pourraient ensuite être portées à l'attention des forces de police et des fonctionnaires judiciaires, afin de stimuler les mécanismes d'application internes. En outre, les commentaires des comités pourraient être rendus publics, de façon que les citoyens puissent savoir dans quelle mesure les critères légaux sont respectés.

473. Il va sans dire que le contrôle efficace du mécanisme du mandat de perquisition est une mesure nécessaire en vue de réaliser l'objectif formulé dans l'affaire *MacIntyre*: à savoir qu'il est indispensable que le public puisse avoir accès aux documents relatifs au mandat de perquisition, afin d'assurer que les abus ne sont pas passés sous silence[559]. Toutefois, bien que l'accès du public à ces documents soit un objectif louable, il ne peut, en soi, assurer la découverte des irrégularités, et surtout de celles qui sont de nature juridique. En effet, il faut pour cela une analyse sérieuse et systématique permettant de replacer les cas individuels dans une juste perspective. En fait, comme l'activité des comités de contrôle porterait, de façon globale, sur les méthodes pratiques de la police, plutôt que sur les cas individuels, elle ne saurait mettre en péril le droit à la vie privée ou les intérêts de l'application du droit pénal qui étaient en jeu dans l'affaire *MacIntyre*. Dans la mesure où l'anonymat des personnes visées par les fouilles ou les perquisitions soumises à l'étude des comités serait préservé, et pour peu que les résultats soient présentés sous une forme globale, les risques de préjudice personnel pour la personne visée et pour l'enquête dont celle-ci fait l'objet seraient réduits au minimum.

474. Au cours des dernières années, les pouvoirs de la police et des juges de paix ont été soumis à l'étude de commissions d'enquête instituées à la suite de la divulgation d'incidents au cours desquels ceux-ci se seraient livrés à des abus ou à des irrégularités. Au Canada, par exemple, on peut citer l'enquête Laycraft, qui a eu lieu à la suite de l'enquête sur l'affaire *Royal American Shows* en Alberta[560], le rapport Pringle, qui a fait suite à des fouilles à nu

générales exécutées dans un motel de Fort Erie (Ontario)[561], de même que les travaux des commissions McDonald et Keable[562], qui sont sans doute encore plus d'actualité. Sans nier l'intérêt que peuvent avoir pour le public ces travaux qui portent sur des cas d'abus bien précis, la plupart d'entre eux ne font qu'illustrer certains aspects controversés et laissent dans l'ombre l'activité générale et quotidienne des organismes concernés. Tiré du rapport d'un groupe de travail américain sur la police, le commentaire qui suit pourrait sans doute s'appliquer au Canada:

> [TRADUCTION]
> Les enquêtes sur les pratiques de la police ont généralement fait suite à des situations critiques, et elles avaient pour objet de mettre au jour l'incompétence ou la corruption. Cependant, quelles qu'aient été les conclusions dans chaque cas, ces enquêtes n'ont jamais fait état des questions fondamentale liées à l'application de la loi qui étaient en jeu[563].

475. En fait, au cours des dernières années, des mécanismes de contrôle systématique ont été introduits dans certains aspects de la procédure pénale au Canada. Parmi ceux-ci figure l'étude des mesures législatives en matière d'armes à feu qui est actuellement en cours pour le compte du Solliciteur général du Canada[564]. Bien que la portée de cette étude dépasse largement l'observation des règles de procédure par la police, les auteurs du premier rapport provisoire ont formulé des conclusions concernant la légalité des pratiques actuelles de la police. Ainsi, ils ont dénoncé certains abus relativement au mécanisme du rapport dans le contexte des perquisitions sans mandat en matière d'armes à feu[565].

476. Étant donné leur compétence constitutionnelle en ce qui concerne «l'administration de la justice[566]», les provinces ont intérêt à exercer un certain contrôle sur la façon pratique dont le mandat de perquisition est utilisé. En conséquence, nous estimons que les comités de surveillance devraient être établis aux niveaux provincial ou local. De cette façon, la mise sur pied de mécanismes externes en vue d'appuyer la structure interne est susceptible d'être plus efficace, tant pour les forces de police provinciales et locales que pour les tribunaux provinciaux chargés de la délivrance des mandats de perquisition. Par exemple, l'évaluation du rendement des juges de paix dans la délivrance des mandats de perquisition pourrait être intégrée aux initiatives provinciales visant à améliorer la formation et la compétence des juges de paix.

477. Il n'est pas nécessaire que ce contrôle soit exercé d'une façon constante. L'examen périodique d'échantillons représentatifs

choisis au hasard serait sans doute suffisant aux fins du mécanisme de contrôle que nous proposons. Par ailleurs, soulignons que puisque les documents soumis à l'examen des comités seraient ceux que la loi exige déjà, ce mécanisme ne représenterait aucune charge de travail additionnelle pour les policiers. En revanche, le travail d'organisation supplémentaire qui incomberait aux administrateurs des tribunaux chargés de prélever ces documents, ainsi que les responsabilités, les frais et les efforts qu'exige la formation des comités de surveillance nous paraissent justifiés. Ils permettront en effet de contrôler de façon efficace l'exercice des pouvoirs importants et exceptionnels associés aux fouilles, aux perquisitions et aux saisies.

Renvois

1. Voir, *supra*, Première partie, par. 97-100.
2. Alan Grant, *La police — un énoncé de politique*, une étude effectuée pour la Commission de réforme du droit du Canada, Ottawa, Approvisionnements et Services, 1980, p. 17.
3. Même si le *Code criminel* confère fréquemment au «juge de paix» le rôle de délivrer les mandats, la répartition des tâches chez les fonctionnaires des cours provinciales et l'attribution des fonctions du «juge de paix» à d'autres officiers de justice relèvent de la compétence des provinces. Voir, *supra*, par. 198-205.
4. Grant, *supra*, note 2, p. 38-40.
5. C'est effectivement cette impression qu'ont les agents municipaux et ceux de la Gendarmerie royale. Ainsi, interrogés à savoir s'ils utilisaient des formules de consentement, un groupe d'officiers municipaux ont répondu: «Non. Ça, c'est pour la G.R.C.»
6. Task Force of Policing in Ontario, *Report*, Toronto, 1974, p. 24.
7. Voir, *supra*, Première partie, par. 212-227.
8. Voir, *supra*, Première partie, par. 228.
9. Voir, *supra*, Première partie, par. 11-13.
10. Richard V. Erickson, *Making Crime: A study of Detective Work*, Toronto, Butterworths, 1981, p. 11.
11. Herman Goldstein, *Policing a Free Society*, Cambridge, Ballinger, 1977, p. 160.
12. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, [1982] 1 R.C.S. 175 (1982), 40 N.R. 181 (C.S.C.).
13. La distinction entre l'application de la loi, ("law enforcement") qui sous-entend une violation de la loi, et le maintien de l'ordre ("order maintenance") qui implique un différend ou un désordre possible, même si souvent il en découle une infraction, a été établie par James Q. Wilson, *Varieties of Police Behavior*, Cambridge, Harvard University Press, 1968, p. 83-84.

14. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, Baton Rouge, Louisiana State University Press, 1969, p. 90-91.

15. Voir, *supra*, par. 42-45.

16. Voir, *supra*, Première partie, par. 100-113.

17. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (1981), p. 25-26 (ci-après appelé le "RCCP Report").

18. Voir, *supra*, Première partie, par. 100-113.

19. Commission de réforme du droit du Canada, *Pour une codification du droit pénal*, Ottawa, Information Canada, 1976, p. 28.

20. *Robbins* v. *California* (1981), 69 L. Ed. 2d 744.

21. Dans *New York* v. *Belton* (1981), 69 L. Ed. 2d 768, où les faits entourant la perquisition dans un véhicule étaient semblables à ceux de l'affaire *Robbins*, la Cour suprême des États-Unis en arriva à une conclusion contraire quant à la légalité des actes des policiers. Dans la récente décision *United States* v. *Ross* (jugement inédit du 1er juin 1982), la Cour a de nouveau cherché à mettre fin à l'incertitude qui règne en ce domaine.

22. Martin L. Friedland, *Access to the Law*, Toronto, Carswell, 1975, p. 63-64.

23. American Law Institute, *A Model Code of Pre-Arraignment Procedure*, 1975 (ci-après appelé le *Code de l'A.L.I.*).

24. Commission de réforme du droit de l'Australie, *Criminal Investigation* (Rapport no 2), Canberra, Australian Government Publishing Service, 1975 et le *Criminal Investigation Bill, 1981*.

25. *RCCP Report*, *supra*, note 17.

26. Voir, *supra*, par. 31-34.

27. Voir, *supra*, Première partie, par. 117-125.

28. Voir, *supra*, par. 64-69.

29. *Criminal Investigation Bill, 1981*, *supra*, note 24; les articles 56 à 62 traitent de la perquisition et de la saisie.

30. *Code de l'A.L.I.*, *supra*, note 23.

31. Voir, *supra*, Première partie, par. 67-79.

32. Voir, *supra*, Première partie, par. 71-79.

33. *Jones* v. *United States* (1959), 362 U.S. 257.

34. *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (C.S. C.-B.).

35. Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of

a Tort Lawyer", dans Allen M. Linden, *Studies in Canadian Tort Law*, Toronto, Butterworths, 1968, p. 430-33.

36. Sir Matthew Hale, *History of the Pleas of the Crown*, vol. II, Londres, E. Rider, 1800, p. 113.

37. Voir John Kaplan, "Search and Seizure: A No Man's Land in the Criminal Law" (1961), 49 *Cal. L. Rev.* 474, p. 478.

38. Voir, *supra*, par. 46-50.

39. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10e éd., Londres, Macmillan, 1965, p. 188.

40. *Ibid.*, p. 208.

41. *Ibid.*, p. 188.

42. Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process*, Toronto, Carswell, 1979, p. 156.

43. Dicey, *supra*, note 39, p. 195-196.

44. *Charte canadienne des droits et libertés*, articles 7, 8, 9, 11, 15.

45. Leon Radzinowicz, *A History of English Criminal Law*, vol. IV, Londres, Stevens and Sons, 1956, p. 163.

46. Jeremy Bentham, *Principles of Morals and Legislation*, vol. I, London, T. Payne & Son, 1789, p. 367-368.

47. E.C.S. Wade, "Police Search" (1934), 50 *L.Q.R.* 354, p. 364.

48. Voir, *supra*, par. 43-45.

49. Rapport de la Commission de réforme du droit du Canada, *Notre droit pénal*, Ottawa, Approvisionnements et Services, 1976, p. 3.

50. Voir le *Code criminel*, S.R.C. 1970, c. C-34, al. 450(2)*d*), 452(1)*f*), 453(1)*i*), et 457(7)*b*).

51. En fait, le propriétaire ou l'occupant de l'endroit faisant l'objet de la perquisition peut n'être même pas un suspect. Voir, *supra*, par. 324-330.

52. Ericson, *Making Crime*, *supra*, note 10, p. 148. Parmi les 96 suspects mis en cause dans l'enquête dont il est question, les biens de 27 d'entre eux ont fait l'objet de perquisition.

53. Voir, *supra*, Première partie, par. 71.

54. *Parti libéral du Québec* c. *Mierzwinski*, [1978] C.S. 804, p. 806; 46 C.C.C. (2d) 118, p. 122.

55. Le programme, la méthodologie et les résultats de l'enquête ont été présentés sous forme de documents de consultation pour chacune des sept villes où l'enquête s'est effectuée. Ces documents sont

actuellement en révision pour être publiés dans un même volume. Pour plus de précisions, voir la note 262 de la Première partie.

56. *Re Bell Telephone Company of Canada* (1947), 89 C.C.C. 196 (H.C. Ont.).

57. Sauf pour le mandat de common law, il semble que ce soit là une exigence, par exemple l'article 25 du *Metropolitan Police Courts Act*, 1839, 2 & 3 Vict., chap. 71, qui prévoit que les objets volés trouvés au cours d'une perquisition doivent être apportés devant un magistrat. En vertu de l'article 26, ce magistrat pouvait déclarer le possesseur coupable d'une infraction mineure ("misdemeanor").

58. *An Act for the Forging and Counterfeiting of Foreign Bills of Exchange*, 43 Geo. 3, (R.-U.), chap. 139, art. 7.

59. *Re PSI Mind Development Institute Ltd. and The Queen* (1977), 37 C.C.C. (2d) 263 (H.C. Ont.), p. 266, 271.

60. *Dillon* v. *O'Brien* (1887), 16 Cox C.C. 245, p. 249.

61. *Leigh* v. *Cole* (1853), 6 Cox C.C. 329, p. 332.

62. S.R.C. 1970, chap. E-10, par. 29(7).

63. La distinction entre la saisie et la surveillance a été expliquée dans la Première partie, *supra*, par. 28-37. Les pouvoirs de perquisition et de saisie n'autorisent qu'à recueillir les renseignements existant déjà.

64. *Loi sur l'accès à l'information*, S.C. 1980-81-82, chap. 111, Annexe I, art. 3.

65. *Rex* v. *Burgiss* (1836), 7 Car. & P. 488, 173 E.R. 217 (C.P.).

66. David G. Price, "Police Seizure of Bank Accounts under Section 29, *Criminal Law Amendment Act, 1975*" (1976-77), 19 *Crim. L. Q.* 86.

67. *Banque Belge pour l'Étranger* v. *Hambrouck*, [1921] 1 K.B. 321 (C.A.).

68. Pour un commentaire sur la nature de la relation entre la banque et ses déposants, voir Ian F.G. Baxter, *The Law of Banking and the Canadian Bank Act*, 2e éd., Toronto, Carswell, 1968, p. 9-11.

69. *Regina* v. *Cuthbertson*, [1981] A.C. 470 (H.L.).

70. *Leigh* v. *Cole*, *supra*, note 61, p. 330-31.

71. Voir, *supra*, par. 123-137.

72. Voir, *supra*, par. 423-435.

73. *Re Thomson* (jugement inédit du 28 août 1979 de la Cour prov. de l'Ont.).

74. Voir notes 503 et 504, *infra*.

75. *Code de l'A.L.I., supra*, note 23, alinéa 210.3(1)*b*).

76. *Federal Rules of Criminal Procedure*, 18 U.S.C., règle 41(b).

77. *Code criminel*, S.R.C. 1970, chap. C-34, art. 283.

78. *Code criminel*, S.R.C. 1970, chap. C-34, art. 312.

79. *Code criminel*, S.R.C. 1970, chap. C-34, art. 295.

80. *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, art. 4.

81. *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27, art. 34 et 42.

82. *Code criminel*, S.R.C. 1970, chap. C-34, par. 159(1).

83. Voir, *supra*, par. 331-338.

84. Des 1825 mandats exécutés ayant fait l'objet de notre enquête, 340 visaient le recouvrement d'objets volés. Voir note 55, *supra*.

85. *R.* v. *Percival and MacDougall* (1971), 2 C.C.C. (2d) 585 (C.S. C.-B.).

86. *Devoe* v. *Long*, [1951] 1 D.L.R. 203 (C.A. N.-B.).

87. *Regina* v. *Kotrbaty* (1978), 5 C.R. (3d) S-13 (C.S. C.-B.), p. S-15.

88. *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, par. 10(6).

89. *Smith* c. *La Reine*, [1976] 1 C.F. 196; (1975) 27 C.C.C. (2d) 252.

90. *Re Hicks and The Queen* (1977), 36 C.C.C. (2d) 91 (C.A. Man.).

91. Incorporées dans ce qui est désigné sous le nom de législation sur les *R.I.C.O.* ("Rackateer Influenced and Corrupt Organizations"), des procédures *in rem* sont prévues à 18 U.S.C. art. 1964. Ces dispositions ne traitent pas de tous les profits provenant du crime mais plûtot de ceux qui ont été investis dans des entreprises commerciales.

92. *The Business of Crime, An Evaluation of the American R.I.C.O. Statutes from a Canadian Perspective*, (ci-après appelé le "Henderson Report", Victoria, Le procureur général de la Colombie-Britannique, 1980.

93. Voir, *supra*, par. 414-422.

94. *Code criminel*, S.R.C. 1970, chap. C-34, par. 420(1).

95. *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, art. 3; *Code criminel*, S.R.C. 1970, chap. C-34, art. 88 et 89.

96. Voir, *supra*, par. 65-66.

97. Notre enquête de quatre mois sur l'utilisation des mandats dans sept villes canadiennes a révélé 100 incidents au cours desquels on a eu recours à des mandats délivrés en vertu de la législation sur la drogue et les stupéfiants. L'emploi de ces mandats a été rapporté dans cinq des sept villes: Edmonton (20 cas); Montréal (3), Toronto (8),

Winnipeg (10) et Vancouver (59). Aucun cas d'utilisation de ces mandats n'a été rapporté à Fredericton ni à St-Jean. Les résultats de cette enquête sont réunis pour être publiés dans un document d'étude distinct.

98. *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27, art. 34

99. *Code criminel*, S.R.C. 1970, chap. C-34, par. 309(1).

100. *Code criminel*, S.R.C. 1970, chap. C-34, al. 159(1)*a*).

101. *R.* v. *Nimbus News Dealers and Distributors Ltd.* (1970), 11 C.R.N.S. 315 (C. prov. Ont.).

102. *Débats de la Chambre des communes*, 1959, vol. V, p. 5815 (le 6 juillet 1959).

103. Voir, par exemple, *Le rapport final de la Commission d'enquête sur l'usage des drogues à des fins non médicales* (Commission LeDain), Ottawa, Information Canada, 1973, p. 125. Même si les amphétamines y sont reconnues comme une drogue dangereuse, le rapport recommande de ne pas créer un délit de simple possession, en raison des difficultés d'application d'une disposition en ce sens et des risques de son application discriminatoire.

104. Voir, *supra*, par. 414-422.

105. Voir Lee Paikin, *La délivrance des mandats de perquisition - Précis* (Une étude effectuée pour la Commission de réforme du droit du Canada), Ottawa, Approvisionnements et Services, 1980 p. 43.

106. Voir note 55, *supra*.

107. Re Worrall, [1965] 2 C.C.C. 1 (C.A. Ont.), p. 5.

108. *Nimbus News*, *supra*, note 101, p. 321.

109. *Re Pink Triangle Press* (1979), 4 W.C.B. 219 (C. prov. Ont.).

110. *Ghani* v. *Jones*, [1970] 1 Q.B. 693 (C.A.), p. 709.

111. Aucun cas de mandat délivré aux termes de l'alinéa 443(1)*c*) n'est ressorti de l'échantillon soumis au comité des juges, dans le cadre de notre enquête.

112. Ce sont là des objets parmi ceux que les policiers participant à notre enquête, ont souvent mentionnés comme ayant fait l'objet d'une saisie. Voir note 55, *supra*.

113. Kaplan, note 37, *supra*, p. 478. Voir aussi Frederick Pollock et F.W. Maitland, *The History of English Law*, 2e éd., vol. 2, Cambridge, University Press, 1911, p. 474.

114. *Re Hicks and The Queen*, *supra*, note 90, p. 96.

115. Voir, *supra*, par. 423-435.

116. *Code criminel*, S.R.C. 1970, chap. C-34, art. 247.

117. *Code criminel*, S.R.C. 1970, chap. C-34, art. 76.1.

118. Voir, par exemple, *The Child Welfare Act*, (Loi sur la protection de l'enfance) S.R.M. 1970, chap. C80, par. 9(1).

119. *Code de l'A.L.I.*, *supra*, note 23, alinéa 210.3(1)*d*).

120. *Federal Rules of Criminal Procedure*, 18 U.S.C. Règle 41 *a*), modifiée le 30 avril 1979.

121. *Eccles* c. *Bourque*, [1975] 2 R.C.S. 739, p. 741; 27 C.R.N.S. 325, p. 326.

122. L'existence de ce pouvoir a été reconnue par le Comité Ouimet dans son rapport intitulé *Rapport du Comité canadien de la réforme pénale et correctionnelle*, Ottawa, Information Canada, 1969, p. 62-63 (ci-après appelé le «Rapport Ouimet»). Voir, *supra*, Première partie, par. 129-130.

123. Voir, *supra*, par. 37.

124. Voir, *supra*, Première partie, par. 229-232.

125. Ericson, *Making Crime*, *supra*, note 10, p. 154.

126. *Criminal Investigation Bill, 1981*, *supra*, note 24, art. 61.

127. *Code de l'A.L.I.*, *supra*, note 23, art. 240.2.

128. Voir, *supra*, Première partie, par. 221-225.

129. Rapport Ouimet, *supra*, note 122, p. 41.

130. Project on Law Enforcememt Policy, Arizona State University Law School, "Model Rules for Law Enforcement: Warrantless Searches of Persons and Places" (1973), 9 *Crim. L. Bull.* 645, p. 680.

131. Ericson, *Making Crime*, *supra*, note 10, p. 154.

132. Arthur Maloney, "The Court and the Police Functions in the Developing of Effective Canadian Corrections" (1960), 2 *Crim. L. Q.* 164, p. 177.

133. Rapport Ouimet, *supra*, note 122, p. 122.

134. Harry Street, *The Law of Torts*, 4e éd., Londres, Butterworths, 1968, p. 76.

135. *Chromiak* c. *La Reine*, [1980] 1 R.C.S. 471; (1979), 49 C.C.C. (2d) 257.

136. *Code criminel*, S.R.C. 1970, chap. C-34, art. 234.1.

137. Voir, *supra*, par. 20.

138. Voir Martin R. Gardner, "Consent as a Bar to Fourth Amendment Scope — A Critique of a Common Theory" (1980), 71 J. *Crim. L. & Criminology* 443. L'article de Gardner fait aussi la revue des auteurs et décisions soutenant la position contraire.

139. *Ibrahim* v. *The King*, [1914] A.C. 599 (C.P.), p. 609.

140. *Boudreau* c. *Le Roi*, [1949] R.C.S. 262, p. 269.

141. *Goldman* c. *La Reine*, [1980] 1 R.C.S. 976; (1979), 51 C.C.C. (2d) 1.

142. *Ibid.*, p. 1006 (R.C.S.); p. 24 (C.C.C.).

143. *Rosen* c. *La Reine*, [1980] 1 R.C.S. 961, p. 975; (1979), 51 C.C.C. (2d) 65, p. 75.

144. *Goldman* c. *La Reine*, *supra*, note 141, p. 1006 (R.C.S.); p. 24 (C.C.C.).

145. *Schneckloth* v. *Bustamonte* (1972), 412 U.S. 218, p. 248-249.

146. Voir, par exemple, Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada*, New York, M.E. Sharpe, 1980.

147. *RCCP Report*, *supra*, note 17, p. 37.

148. Des directives concernant le consentement à la perquisition sont incluses dans le Manuel des opérations de la G.R.C., Division "O", distribué en 1977. D'autres divisions de la G.R.C. ont informé nos recherchistes qu'elles ne suivaient pas ces directives.

149. David Watt, *Law of Electronic Surveillance in Canada*, Toronto, Carswell, 1979, p. 61.

150. *Rapport de la Commission d'enquête traitant de la Direction des services et des enquêtes au sein du ministère des Postes*, Ottawa, Approvisionnements et Services, 1981, p. 178.

151. *RCCP Report*, *supra*, note 17, p. 37.

152. *Criminal Investigation*, *supra*, note 24, p. 97.

153. *Laporte* v. *Laganière J.S.P.* (1972), 18 C.R.N.S. 357 (B.R. Qué.), p. 365.

154. *Leigh* v. *Cole*, *supra*, note 61.

155. *Bessell* v. *Wilson* (1853), 20 L.T. 233.

156. La conduite dangereuse constitue, aux termes du paragraphe 233(4) du *Code criminel*, S.R.C. 1970, chap. C-34, une infraction à option de procédure; par conséquent, un agent de la paix peut libérer un prévenu mis en état d'arrestation en vertu de l'alinéa 452(1)*b*).

157. *Code de l'A.L.I.*, *supra*, note 23, art. 230.2.

158. La Commission de réforme du droit du Canada traite de cette question dans un document de travail distinct.

159. Voir *New York* v. *Belton*, *supra*, note 21; *Robbins* v. *California*, *supra*, note 20, et *United States* v. *Ross*, *supra*, note 21.

160. Voir, *supra*, par. 146-147.

161. *Chimel* v. *California* (1960), 395 U.S. 752, p. 763.

162. *RCCP report*, *supra*, note 17, p. 63.

163. Voir, par exemple, *R.* v. *Stonechild* (1981), 61 C.C.C. (2d) 251 (Cour comté Man.) et *R.* v. *Landry* (1981), 63 C.C.C. (2d) 289 (C.A. Ont.). Cette dernière affaire, actuellement en appel devant la Cour suprême du Canada, pourrait aller à l'encontre de *Eccles* c. *Bourque*, *supra*, note 121.

164. Voir, par exemple, la dissidence du juge Frankfurter dans *United States* v. *Rabinowitz* (1950), 339 U.S. 56, p. 79.

165. Voir, *supra*, par. 211-219.

166. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443.

167. Voir, *supra*, par. 267-270.

168. Voir, *supra*, par. 288-298.

169. Voir, *supra*, par. 32-33.

170. Voir, *supra*, Première partie, par. 125.

171. Voir, *supra*, par. 32-33.

172. *Code de l'A.L.I.*, *supra*, note 23, par. 230.1(2).

173. *Gottschalk* v. *Hutton* (1921), 36 C.C.C. 298 (C.A. Alb.), p. 302.

174. Voir, *supra*, par. 423-435.

175. *United States* v. *Ross*, *supra*, note 21.

176. *Eccles* v. *Bourque*, *supra*, note 121, p. 747 (R.C.S.); p. 330 (C.R.N.S.).

177. Voir, *supra*, Première partie, par. 98 où l'on explique pourquoi la législation relative aux stupéfiants et drogues est jugée «reliée au droit criminel».

178. Voir note 97, *supra*.

179. *Code criminel*, S.R.C. 1970, chap. C-34, art. 312; *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, art. 3.

180. Voir, *supra*, Première partie, par. 54.

181. Les pouvoirs relatifs à la perquisition dans les véhicules automobiles peuvent avoir leur source dans les lois provinciales concernant les alcools: R.S.A. 1980, chap. L-17, art. 115, 117; R.S.B.C. 1979, chap. 237, art. 67; S.R.M. 1970, chap. L160, art. 248; L.R.N.B. 1973, chap. L-10, art. 163, 165; S.N. 1973, chap. 103, art. 93; R.S.N.S. 1967,

chap. 169, art. 126; R.S.O. 1980, chap. 244, par. 48(2); R.S.P.E.I. 1974, chap. L-17, art. 60; R.S.S. 1978, chap. L-18, art. 131.

182. *Chambers* v. *Maroney* (1969), 399 U.S. 42, p. 50-51.

183. *Code de l'A.L.I.*, *supra*, note 23, art. 260.3.

184. *RCCP Report*, *supra*, note 17, p. 30

185. Voir, *supra*, par. 157-163.

186. *Chromiak* c. *La Reine*, *supra*, note 135.

187. *Robbins* v. *California*, *supra*, note 20.

188. *New York* v. *Belton*, *supra*, note 21.

189. *United States* v. *Ross*, *supra*, note 21.

190. Voir, *supra*, Première partie, par. 55-56.

191. *Criminal Investigation Bill* (1981), *supra*, note 24, alinéa 60(1)*d*).

192. Elisabeth Scarff, Ted Zaharchuk, Terrence Jacques et Michael McAuley, *L'évaluation des mesures législatives canadiennes relatives au contrôle des armes à feu: Premier rapport provisoire*, Ottawa, Approvisionnements et Services, 1981, p. 123-127.

193. *United States* v. *Rubin*, 474 F. 2d 262 (3e Circuit) certiorari refusé (1973), 414 U.S. 833, p. 268. Voir aussi: Linda Mullenbach, "Warrantless Residential Searches to Prevent the Destruction of Evidence" (1979), 70 J. *Crim. L. & Criminology* 255.

194. *RCCP Report*, *supra*, note 17, p. 33.

195. *Code de l'A.L.I.*, *supra*, note 23, par. 230.1(1).

196. *Ibid.*, Commentaire, p. 263.

197. *RCCP Report*, *supra*, note 17, p. 26-27.

198. Voir, *supra*, Première partie, par. 81.

199. Advisory Committee on Drug Dependence [Home Office], *Powers of Arrest and Search in Relation to Drug Offences*, Londres, Her Majesty's Stationary Office, 1970, p. 39.

200. Ericson, *Reproducing Order*, Toronto, University of Toronto Press, 1982, p. 157.

201. Voir note 55, *supra*.

202. Voir, *supra*, Première partie, par. 19-21.

203. *R.* c. *Whitfield*, [1970] R.C.S. 46.

204. L. H. Leigh, *Police Powers in England and Wales*, Londres, Butterworths, 1975, p. 50-51. Voir *Barnett and Grant* v. *Campbell*

(1902), 21 N.Z.L.R. 484 (C.A.), p. 493, par le juge Cooper.

205. *Dillon* v. *O'Brien*, *supra*, note 60.

206. Voici une liste de choses dont la possession constitue un acte criminel ou une infraction mixte aux termes du *Code criminel*, S.R.C. 1970, chap. C-34: un faux passeport (par. 58(3)), une arme cachée (art. 87), une arme prohibée (art. 88), une arme à autorisation restreinte non enregistrée (art. 89), une carte de crédit volée (art. 301.1), des biens criminellement obtenus (art. 312) et de la monnaie contrefaite (art. 408). Il existe également des infractions de possession aux termes de l'article 3 de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, et du par. 34(2) et de l'article 41 de la *Loi des aliments et drogues*, S.R.C. 1970, chap. F-27.

207. *Code criminel*, S.R.C. 1970, chap. C-34, alinéa 450(1)*b*).

208. Voir, *supra*, par. 158.

209. *The Brixton Disorders, 10-12 April, 1981*, Report of an Inquiry by the Rt. Hon. Lord Scarman, Cmnd. 8427 (1982), p. 56-61.

210. Voir, par exemple, le Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974 *Report* (1975) (ci-après appelé le "Pringle Report").

211. Voir, par exemple, Peter K. MacWilliams, "Illegality of Random Searches" (1979), 27 *Chitty's L.J.* 199.

212. *Moore* c. *La Reine*, [1979] 1 R.C.S. 115; *Dedman* v. *The Queen* (1981), 59 C.C.C. (2d) 97 (C.A. Ont.).

213. Voir, *supra*, par. 257-258.

214. *Re Worrall*, *supra*, note 107, p. 11. Bien que le juge Roach ait été dissident, la majorité n'a pas exprimé son désaccord sur ce point.

215. *Re Den Hoy Gin* (1965), 47 C.R. 89 (C.A. Ont.).

216. Voir Arthur Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates" (1973), 64 *J. of Crim. Law and Criminology* 270.

217. *Campbell* v. *Clough* (1979), 61 A.P.R. 249 (C.S.I.-P.-E.), p. 251.

218. Voir note 55, *supra*.

219. *R.* v. *Colvin; Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (H.C. Ont.), p. 11.

220. Voir, Première partie, *supra*, par. 219.

221. *Re Goodbaum and The Queen* (1977), 38 C.C.C. (2d) 473 (C.A. Ont.).

222. Voir *United States* v. *Chadwick* (1977), 433 U.S. 1, p. 9, par le juge en chef Burger.

223. Voir P.A. Kolers "Readibility", dans Friedland, *supra*, note 22, p. 136-8.

224. James Fontana, *The Law of Search Warrants in Canada*, Toronto, Butterworths, 1974, p. 7.

225. *Re Pacific Press and The Queen*, *supra*, note 34.

226. Ericson, *Making Crime*, *supra*, note 10, p. 152-53.

227. Pour la jurisprudence relative à cette recherche du magistrat le plus favorable, voir *R.* v. *Allen* (1974), 20 C.C.C. (2d) 447 (C.A. Ont.).

228. Les récentes décisions canadiennes sur la question de la spécificité comprennent *Abou-Assale* c. *Bourdon* [1978] C.S. 142, 39 C.C.C. (2d) 546 (*sub. nom Abou-Assale and Pollock and The Queen*), *PSI Mind*, *supra*, note 59, et *Royal American Shows Incorporated* v. *The Queen*, [1975] 6 W.W.R. 571 (C.S. Alb.).

229. Voir *La délivrance des mandats de perquisition*, *supra*, note 105, p. 18.

230. Voir aussi la position du *Advisory Committee on Drug Dependence*, *supra*, note 199, p. 42.

231. *Re Newfoundland & Labrador Corp. Ltd.* (1974), 6 Nfld. & P.E.I.R. 274 (C.A. T.-N.).

232. *Abou-Assale* c. *Bourdon*, *supra*, note 228.

233. *Regency Realties Inc.* v. *Loranger* (1961), 36 C.R. 291 (C.S. Qué.).

234. On avait remis aux membres du comité des juges qui ont évalué les documents émanant de Montréal (et effectivement au comité dans son ensemble) un précis préparé par la Commission, *La délivrance des mandats de perquisition*, *supra*, note 105. Ce précis fait état de toutes les décisions pertinentes des tribunaux, notamment *Abou-Assale* et *Regency Realties Inc.*. Il est évident que les membres du comité, en procédant à l'appréciation des documents, ont été portés à suivre le point de vue plus strict adopté dans cette dernière décision. Voir Première partie, note 262, *supra*.

235. *Re Lubell and The Queen* (1973), 11 C.C.C. (2d) 188 (H.C. Ont.), p. 190.

236. Pour un examen du privilège de l'informateur, voir *Bisaillon* c. *Keable* [1980] C.A. 316, p. 328; (1980), 17 C.R. (3d) 193, p. 232 (par le juge L'Heureux-Dubé).

237. *Newfoundland & Labrador Corp. Ltd.*, *supra*, note 231, p. 281.

238. Voir *Royal America Shows Inc.* v. *The Queen*, *supra*, note 228. Selon le rapport Laycraft, le juge Cavanagh, qui a entendu la demande d'annulation du mandat de perquisition, n'était pas au courant que la demande du mandat était fondée sur une communication interceptée: *Royal*

American Shows Inc. and Its Activities in Alberta, Report of a Public Inquiry (juin 1978), p. B-27.

239. Les seules exceptions à ces règles se retrouvent aux articles 101, 160 et 281.3 du *Code criminel*, S.R.C. 1970, chap. C-34.

240. Voir, par exemple, *The Provincial Court Act*, R.S.B.C. 1979, chap. 341, par. 24(3).

241. En fait le Nouveau-Brunswick a conservé sa loi sur les juges de paix. *The Justice of the Peace Act*, R.S.N.B. 1952, chap. 122, n'a pas été incorporée dans la refonte de 1973, mais la loi n'a pas été non plus abrogée. Il n'y a simplement plus en cette province de nomination de juges de paix.

242. Alberta Board of Review, *Administration of Justice in the Provincial Courts of Alberta* (1975), p. 18. (ci-après appelé le "Kirby Report").

243. Voir note 55, *supra*.

244. Voir les articles 455.3, 457, 465, et 720 respectivement du *Code criminel*, S.R.C. 1970, chap. C-34.

245. Le *Pringle Report*, *supra*, note 210, p. 20.

246. Royal Commission Inquiry into Civil Rights, *Report Number One* (1968), p. 518. (ci-après appelé "McRuer Report").

247. *The Crown Attorneys Act*, R.S.O. 1980, chap. 107, alinéa 12 *h*), et *The Crown Attorneys Act*, (Loi sur les substituts du procureur général) S.R.M. 1970, chap. C330, alinéa 6(1)*b*).

248. Royal Commission on Justices of the Peace, 1946-48, *Report*, Londres, Her Majesty's Stationery Office, 1948, et *The Training of Justices of the Peace in England and Wales*, Londres, Her Majesty's Stationery Office, 1965.

249. *Coolidge* v. *New Hampshire*, *supra*, note 166.

250. Le *Kirby Report*, *supra*, note 242, et le *McRuer Report*, *supra*, note 246, en sont deux exemples.

251. *Kirby Report*, *supra*, note 242, p. 20.

252. La Commission de réforme du droit du Canada, Document de travail n° 15, *Les poursuites pénales: responsabilité politique ou judiciaire*, Ottawa, Information Canada, 1975, p. 45.

253. *Commission de réforme du droit de l'Australie*, *Report 2*, *supra*, note 24, p. 95.

254. Voir, par exemple, *People* v. *Aguirre* (1972), 103 Cal. R. 153. Pour des commentaires sur les affaires relatives aux mandats verbaux de perquisition, voir Paul D. Beechen, "Oral Search Warrants: A New Standard of Warrant Availability", (1973) 21 *U.C.L.A. Law Rev.* 691, p. 694.

255. Pour un excellent exemple de la façon dont fonctionne un système de mandats verbaux, voir Charles E. Bell, "Telephonic Search Warrants", (1976) 5 *San Diego City Law Enforcement Qty* 10.

256. Beechen, *supra*, note 254, p. 702.

257. Bell, *supra*, note 255.

258. Hale, *supra*, note 36, p. 150.

259. Hawkins, tout en parlant spécifiquement des mandats d'arrestation, englobe dans ce sujet les mandats de perquisition pour des marchandises volées, mandats qui avaient été élaborés par Hale. Ce faisant, il admet qu'un mandat peut être adressé à «tout constable ou même à un particulier». William Hawkins, *A Treatise of the Pleas of the Crown*, vol. II, 8e éd., Londres, Sweet and Maxwell, 1824, p. 130.

260. *Code criminel*, S.R.C. 1970, chap. C-34, par. 449(3).

261. *Hétu* c. *Dixville Butter and Cheese Association* (1908), 40 R.C.S. 128, p. 132.

262. Commission de réforme du droit du Canada, *Les poursuites pénales: responsabilité politique ou judiciaire*, *supra*, note 252, p. 46.

263. Cette proposition remonte au philosophe du dix-septième siècle, Thomas Hobbes. Voir Hobbes, *Leviathan*, Londres, Penguin, 1968, p. 227-8, et aussi Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, New York, Franklin, 1883, vol. 1, p. 184.

264. *Fanning* v. *Gough* (1968), 18 C.C.C. 66 (C.S. I.-P.-E.).

265. *R.* v. *Sollaway & Mills* (1930), 53 C.C.C. 271 (C.S. Ont. Div. Ap.).

266. *Re Old Rex Café* (1972), 7 C.C.C. (2d) 279 (C. ter. T.-N.-O.).

267. *Re Goodbaum and The Queen*, *supra*, note 221.

268. Hale, *supra*, note 36.

269. Par exemple, nous avons examiné, au cours de notre enquête, 443 mandats valides le jour seulement et de ce nombre 87 pour cent avaient été efficacement exécutés le jour. Voir note 55, *supra*.

270. Voir le *Code de procédure pénale de France*, art. 59, (31 décembre 1957). On a présenté récemment des modifications importantes à ce *Code*. Elles ont pour effet de réduire radicalement le rôle du juge d'instruction, mais sans cependant modifier les dispositions pertinentes à la présente étude.

271. *Crimes Act*, 1914 (Commonwealth, N° 12), art. 10.

272. *Criminal Investigation Bill, 1981*, *supra*, note 24, sous-alinéa 61(4)*b*)(ii).

273. William E. Ringel, *Searches & Seizures, Arrests and Confessions*,

New York, Clark Boardman, 1972, p. 243.

274. *Regina* v. *Execu-Clean Ltd.*, (jugement inédit de la Haute Cour d'Ontario, en date du 30 janvier 1980).

275. Voir note 55, *supra*.

276. *R.* v. *Adams*,[1980] 1 All E.R. 473 (C.A.).

277. Voir note 55, *supra*.

278. Voir *The Liquor Control Act*, (Loi sur les alcools) S.R.M. 1970, chap. L160, par. 244(1).

279. Voir *RCCP Report*, *supra*, note 17, p. 36, et *Criminal Investigation Bill, 1981*, *supra*, note 24, sous-alinéa 61(5)*a*) (iii) et sous-alinéa 61(5)*b*) (iv).

280. Pour d'autres délais d'exécution voir le *Code de l'A.L.I.*, *supra*, note 23, alinéa 220.2(2)*g*) (5 jours) et les *American Federal Rules*, 18 U.S.C., règle 41*c*)(1) (10 jours).

281. Metropolitan Toronto Police, *Training Précis, Search of Persons and Premises* (mars 1978), p. 19.

282. Voir note 55, *supra*.

283. *Chic Fashions (West Wales) Ltd.* v. *Jones*, [1968] 2 Q.B. 299 (C.A.), p. 313.

284. Voir, *supra*, par. 316-321.

285. *Stanley* v. *Georgia* (1969), 394 U.S. 557, p. 572.

286. Voir, *supra*, par. 267-270.

287. Commission de réforme du droit du Canada, Document de travail n° 29, *Partie générale — responsabilité et moyens de défense*, Ottawa, Approvisionnements et Services, 1982, p. 130.

288. Voir, *supra*, par. 271-298.

289. Voir, *supra*, par. 412.

290. *Levitz* v. *Ryan* (1972), 9 C.C.C. (2d) 182 (C.A. Ont.). Voir aussi *Harbison* v. *Chicago, R.I. and R.R. Co.* (1931), 37 S.W. Rep. 2d 609 (C. sup. Miss.).

291. Ontario Police College, *Probationary Constable Training Outline*, Partie A, n° 5, p. 1.

292. Metropolitan Toronto Police, *Training Précis Narcotics & Drugs Programme*, Appendice (septembre 1977), p. 47-48.

293. Voir, *supra*, par. 288-298.

294. *Semayne's Case* (1603), 5 Co. Rep. 91a; 77 E.R. 194 (K.B.), p. 195.

295. *Wah Kie* v. *Cuddy (No. 2)* (1914), 23 C.C.C. 383 (C.A. Alb.).

296. *Eccles* c. *Bourque*, *supra*, note 121, p. 747 (R.C.S.); p. 330 (C.R.N.S.).

297. Voir *Dunfee* v. *State* (1975), 346 A. 2d 173 (Sup. Del.), et *U.S.* v. *Johns* (1972), 466 F. 2d 1364 (C.A. 5e Circuit).

298. *U.S.* v. *West* (1964), 328 F. 2d 16 (C.A. 2e Circuit).

299. *Levitz* v. *Ryan*, *supra*, note 290.

300. *Code de l'A.L.I.*, *supra*, note 23, par. 220.3(4).

301. Les «motifs raisonnables» de la plainte étaient reproduits sur certains mandats délivrés à Montréal, pendant notre enquête, en raison de la présence d'un papier carbone. Toutefois, les motifs mentionnés n'étaient habituellement rien d'autre que «enquête de la police».

302. Voir, *supra*, par. 304-315.

303. *RCCP Report*, *supra*, note 17, p. 29.

304. *Levitz* v. *Ryan*, *supra*, note 290.

305. Voir, Première partie, *supra*, par. 17-27 pour la distinction entre le pouvoir d'arrestation et celui de fouille, de perquisition et de saisie.

306. *Scott* v. *The Queen* (1975), 24 C.C.C. (2d) 261 (C.A.F.).

307. *RCCP Report*, *supra*, note 17, p. 29.

308. *Code de procédure pénale de France*, *supra*, note 270, art. 57, 66 et 96.

309. Metro Toronto Police, *supra*, note 281, p. 19.

310. *Entick* v. *Carrington* (1765), St. Tr. 1067.

311. *Federal Rules of Criminal Procedure*, 18 U.S.C. règle 41*d*).

312. *RCCP Report*, *supra*, note 17, p. 36.

313. Voir, *supra*, par. 131-133.

314. Voir, *supra*, par. 237-238.

315. *Coolidge*, *supra*, note 166, p. 467.

316. *Ibid.*, p. 468.

317. Sheldon R. Shapiro, *Annotation: Search and Seizure: Observation of Objects in "Plain View" — Supreme Court Cases* (1972), 29 L. Ed. 2d 1067, p. 1069.

318. *Ibid.*, p. 1073.

319. *Coolidge*, *supra*, note 166, p. 467-68, 471.

320. *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, alinéa 10(1)*b*).

321. *R.* v. *Jaagusta* (1974), 3 W.W.R. 766; suivi dans *R.* v. *Erickson* (1978), 39 C.C.C. (2d) 447 (C. dist. Ont.).

322. *Pringle Report*, *supra*, note 210.

323. *Ibid.*, p. 59 et 72. Des directives quelque peu différentes, permettant les fouilles à nu lorsqu'il existe des «motifs raisonnables et probables de croire que le suspect cache sur sa personne des éléments de preuve ou une arme» sont énoncées dans le Manuel des opérations de 1977 d'une division de la G.R.C.

324. Voir note 55, *supra*.

325. *Ybarra* v. *Illinois* (1979), 444 U.S. 85.

326. Voir, *The Brixton Disorders*, *supra*, note 209.

327. Dans *Ybarra*, *supra*, note 325, on utilise le critère du «caractère raisonnable» aussi bien que celui de la «cause plausible».

328. *Terry* v. *Ohio* (1967), 392 U.S. 1.

329. *RCCP Report*, *supra*, note 17, p. 29.

330. *Criminal Investigation Bill, 1981*, *supra*, note 24, par. 57(1).

331. Voir, *supra*, Première partie, par. 81.

332. Voir notes 23-24, *supra*, ainsi que les articles 101 et 353 du *Code criminel*, S.R.C. 1970, chap. C-34.

333. Le même commentaire peut d'ailleurs être fait à propos de l'article 101 qui permet la perquisition sans mandat lorsqu'il serait impraticable de procéder par voie de mandat. L'historique de l'article 101 montre que les dispositions sur le mandat ont précédé celles portant sur les perquisitions sans mandat. Lorsque celles-ci furent adoptées, elles étaient censées ne s'appliquer que dans des circonstances exceptionnelles. Voir, *supra*, Première partie, par. 173-177.

334. Voir, *supra*, Première partie, par. 207.

335. Dans le cadre de notre enquête, les fouilles de personnes effectuées dans l'exécution des mandats délivrés en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, ont comporté 22,4 pour cent de fouilles à nu et 0,1 pour cent de fouilles internes. Les pourcentages correspondants pour les autres catégories de mandats étaient de 5,3 pour cent et 0,5 pour cent. Voir note 55, *supra*.

336. Voir, *supra*, par. 273.

337. *Giordano v. State* (1953), 100 A. 2d 31 (C.A. Mar.).

338. *Rex* v. *Gibson* (1919), 30 C.C.C. 308 (C.S. Alb.).

339. *Royal American Shows*, *supra*, note 228.

340. Voir, *supra*, Première partie, par. 232.

341. Voir *State* v. *De Simone* (1972), 288 A. 2d 849 (C. sup. N.J.), où cette question est examinée.

342. *Criminal Investigation*, *supra*, note 24, p. 58. Les recommandations de la Commission de réforme du droit de l'Australie ont été incorporées dans le *Customs Amendment Act 1979* (Commonwealth, N° 92), art. 6. Il y est prévu que la fouille des cavités corporelles doit être autorisée par mandat et pratiquée par un médecin.

343. *Pringle Report*, *supra*, note 210, p. 63.

344. Advisory Committee on Drug Dependence, *supra*, note 199, p. 39.

345. *Pringle Report*, *supra*, note 210.

346. Voir, par exemple, le Ontario Police College, *Search and Seizure Précis* (1976), p. 31.

347. *Laporte* v. *Laganière J.S.P.*, *supra*, note 153.

348. *Rochin* v. *California* (1981), 342 U.S. 165.

349. Louis S. Goodman et Alfred Zack Gilman (éd.), *The Pharmacological Basis of Therapeutics*, 4e éd., New York, MacMillan, 1970, p. 381 (cocaïne), p. 247 (morphine et autres opiats), p. 108 (barbituriques).

350. *Scott* v. *The Queen*, *supra*, note 306, p. 269.

351. Voir, *supra*, par. 271-275.

352. Cet énoncé de politique de la G.R.C. apparaît au *Pringle Report*, *supra*, note 210, p. 60.

353. *Code criminel*, S.R.C. 1970, chap. C-34, art 178.1.

354. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, *supra*, note 12, p. 190 (R.C.S.); p. 194 (N.R.).

355. *Ibid.*, p. 201 (R.C.S.); p. 205 (N.R.).

356. *MacIntyre* v. *Attorney General of Nova Scotia and Grainger*, (1980), 38 N.S.R. (2d) 633, p. 655.

357. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, *supra*, note 12, p. 187 (R.C.S.); p. 192 (N.R.).

358. *Realty Renovations Ltd.* v. *Attorney General of Alberta* (1978), 44 C.C.C. (2d) 249, p. 253. La *British Royal Commission on Criminal Procedure* en est arrivée à la même conclusion. Voir *RCCP Report*, *supra*, note 17, p. 36.

359. *Loi sur la protection des renseignements personnels*, S.C. 1980-81-82, chap. 111, Annexe II, art. 3.

360. Voir le *Freedom of Information Act* des États-Unis, Title 5 U.S.C.

(1976) par. 552(b)e)(7); ce dernier paragraphe exclut: [TRADUCTION] «les dossiers d'enquête constitués aux fins d'application de la loi ... dans la mesure où la communication de ces dossiers constituerait une violation injustifiée de la vie privée».

361. *Kimber* v. *The Press Association Ltd.*, [1893] 1 Q.B. 65 (C.A.), p. 68.

362. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, *supra*, note 12, p. 187 (R.C.S.); p. 191 (N.R.).

363. Voir, *supra*, par. 460-468.

364. *Déclaration canadienne des droits*, alinéa 1 *f*). Voir aussi la *Charte canadienne des droits et libertés*, alinéa 2 *b*).

365. *Re F.P. Publications (Western) Ltd. and The Queen* (1979), 51 C.C.C. (2d) 110.

366. *Code criminel*, S.R.C. 1970, chap. C-34, par. 457.2(1) et 467(1).

367. Des 1879 mandats exécutés dans le cadre de notre enquête, 14,6 pour cent comportaient la fouille des locaux d'une société de téléphone.

368. Voir, par exemple, J.S. Williams, *The Legal Protection of Privacy*, Ottawa, Information Canada, 1974.

369. Voir, *supra*, par. 296.

370. *Code de l'A.L.I.*, *supra*, note 23, par. 280.2(2).

371. Voir, *supra*, Première partie, note 262.

372. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 495.

373. *Code criminel*, S.R.C. 1970, chap. C-34, art. 629.

374. *Supra*, Première partie, note 262.

375. *Re United Distillers Ltd.* (1946), 88 C.C.C. 338 (C.S. C.-B.), p. 341.

376. 42 U.S.C. 2000 aa 11.

377. Voir, *supra*, par. 62-63.

378. *Business Practices Act*, (Loi sur les pratiques de commerce) R.S.O. 1980, chap. 55, par. 12(1).

379. La Conférence sur l'uniformisation des lois au Canada fut tenue à Saskatoon du 16 au 25 août 1979. La section du droit criminel adopta la recommandation d'un système d'ordonnance pour geler les comptes ou avoirs d'une personne. Voir Conférence sur l'uniformisation des lois au Canada, *Proceedings of the Sixty-First Annual Meeting* (1979), p. 44.

380. *Henderson Report*, *supra*, note 92. Un projet de loi était annexé au rapport: les ordonnances intérimaires ayant pour but de geler les avoirs y sont traitées à l'article 6.

381. 18 U.S.C. 1963 (b). Pour un commentaire sur la portée des ordonnances visant à geler les avoirs, dans le contexte des lois américaines, voir Harry Myers et Joseph P. Brzostowski, *Drug Agents' Guide to Forfeiture of Assets*, Washington, U.S. Gov't. Printing Office, 1981 , p. 331-333.

382. *West Mercia Constabulary* v. *Wagener*, [1982] 1 W.L.R. 127 (Q.B.).

383. *Loi de 1978 modifiant le droit pénal* (Bill C-21), art. 59. La procédure de mise sous scellé des documents saisis reçut l'appui de l'Association du Barreau canadien qui adopta une résolution visant à assurer le secret professionnel entre client et avocat: Résolution n° 11 adoptée le 28 août 1980.

384. La Cour suprême n'avait pas encore rendu sa décision dans l'affaire *Mierswinski* lorsque ce document fut achevé.

385. *R.* v. *Colvin*, *supra*, note 219.

386. *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, chap. C-23.

387. *In re Shell Canada Ltd.*, [1975] C.F. 184, p. 193; 22 C.C.C. (2d) 70, p. 78-79.

388. *Loi de l'impôt sur le revenu*, S.R.C. 1970-71-72, chap. 63, art. 232.

389. Commission de réforme du droit du Manitoba, *Report on Enforcement of Revenue Statutes*, 1979, p. 24-25.

390. *Charte canadienne des droits et libertés*, alinéa 2 *b*).

391. *Zurcher* v. *Stanford Daily* (1978), 436 U.S. 547.

392. *The Privacy Protection Act of 1980*, présentée en réplique à l'arrêt *Zurcher*, renferme des dispositions qui auraient pour effet, dans une large mesure, de passer outre à l'opinion de la majorité, sous réserve de certaines exceptions, notamment la nécessité d'intervention lorsque la sécurité nationale est en jeu ou la vie humaine en danger. Il est maintenant illégal de perquisitionner à la recherche du matériel en possession des journalistes ou de saisir ce matériel. 42 U.S.C. 2000 aa.

393. *Re Pacific Press Ltd. and The Queen*, *supra*, note 34, p. 494.

394. Voir, *supra*, par. 324-330.

395. *Senior* v. *Holdsworth; Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23.

396. *Ibid.*, p. 34.

397. *Reid* v. *Telegram Publishing Co. Ltd. and Area* (1961), 28 D.L.R. (2d) 6.

398. *McConachy* v. *Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349.

399. *Rapport de la Commission d'enquête sur des opérations policières en territoire québécois*, Québec, Gouvernement du Québec, 1981 (ci-après appelé le «Rapport Keable»).

400. Commission d'enquête sur certaines activités de la Gendarmerie royale du Canada, *La liberté et la sécurité devant la loi* (deuxième rapport), Ottawa, Approvisionnements et Services, 1981 (ci-après appelé le «Rapport McDonald»).

401. Rapport Keable, *supra*, note 399, p. 423. Rapport McDonald, *supra*, note 400, p. 1077.

402. Rapport Keable, *supra*, note 399, p. 247-308.

403. *Ibid.*, p. 259.

404. Rapport McDonald, *supra*, note 400, p. 118-120.

405. Un mémoire public remis à la Commission McDonald par la Gendarmerie royale concluait que «lorsque la légalité des investigations exploratoires est examinée, cette légalité apparaît moins claire».

406. La position adoptée dans le Rapport McDonald a fait l'objet de critiques dans un mémoire, en date du 14 juin 1981, rédigé pour le ministère de la Justice par l'étude Lang, Michener, Farquharson et Wright. Ce mémoire a été rendu public par le ministère de la Justice le 27 août 1981, en même temps qu'un autre mémoire de l'honorable Wishart Spence, autrefois juge de la Cour suprême du Canada.

407. *Re Bell Telephone Company of Canada*, *supra*, note 56, p. 197.

408. *Ghani* v. *Jones*, *supra*, note 110, et *Eccles* c. *Bourque*, *supra*, note 121, sont cités dans le mémoire de Lang, Michener.

409. *Colet* c. *La Reine*, [1981] 1 R.C.S. 2; 57 C.C.C. (2d) 105.

410. *R.* v. *Dass* (1979), 47 C.C.C. (2d) 194 (C.A. Man.); autorisation d'appel à la Cour suprême du Canada refusée (p. 214).

411. *United States* v. *Dalia*, (1979), 441 U.S. 238.

412. Voir, par exemple, *Wah Kie* v. *Cuddy (No. 2)*, *supra*, note 295. La jurisprudence américaine a décidé que la règle permettant «d'entrer sans frapper» n'est pas restreinte aux entrées clandestines. *United States* v. *Dalia*, *supra*, note 411, p. 247-248.

413. Rapport McDonald, *supra*, note 400, p. 1077.

414. *Ibid.*, p. 623-629.

415. *Ibid.*, p. 600-601.

416. *Ibid.*, p. 625-627. Voir tout particulièrement les alinéas 2 *a*) et 8 *c*) de la loi proposée.

417. Voir, Première partie, *supra*, par. 78-79.

418. Rapport McDonald, *supra*, note 400, p. 144-145 et 599-600.

419. Voir, *supra*, par. 42-50.

420. Voir, *supra*, Première partie, par. 73.

421. Rapport McDonald, *supra*, note 400, p. 110-111.

422. Voir, *supra*, par. 55-60.

423. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, *supra*, note 12.

424. Voir les recommandations 26, 27, 28, 29, 35 et 36.

425. Rapport McDonald, *supra*, note 400, p. 1077.

426. *Ibid.*, p. 118-120.

427. *Ibid.*, p. 118.

428. *Code criminel*, S.R.C. 1970, chap. C-34, art. 178.22. Voir aussi Chambre des communes du Canada, *Procès-verbaux du Comité permanent de la Justice et des questions juridiques*, le 5 juin 1973, 13: 6 et *Débats de la Chambre des communes*, le 27 novembre 1973, p. 8199.

429. Louise Savage, "An Analysis of the Federal and Provincial Annual Reports Relating to the Use of Court Authorized Electronic Surveillance by Law Enforcement Officials in Canada" (une étude rédigée pour la Commission de réforme du droit du Canada en 1979, mais non publiée), p. 69-79.

430. *Code criminel*, S.R.C. 1970, chap. C-34, art. 178.12(3) et 178.23(3).

431. *Code criminel*, S.R.C. 1970, chap. C-34, par. 178.14.

432. Voir, *supra*, par. 55-61.

433. Voir le Rapport Keable, *supra*, note 399, p. 241-308, 349-379.

434. *Gouled* v. *United States* (1921), 255 U.S. 298, p. 306.

435. *United States* v. *Dalia*, *supra*, note 411, p. 247.

436. Voir, par exemple, le Bill C-26, 1977-78, qui aurait ajouté au *Code criminel* une disposition permettant d'ouvrir le courrier. Voir aussi la Recommandation 268 du Rapport McDonald, *supra*, note 400, p. 1179.

437. Voir, Première partie, *supra*, par. 84-95.

438. Voir, par exemple, *Payton* v. *New York* (1979), 445 U.S. 573, p. 583-584.

439. S.R.C. 1970, chap. C-40, art. 139.

440. S.R.C. 1970, chap. E-12, art. 76.

441. Ces exigences sont énoncées dans le Manuel des opérations de la G.R.C. de 1980.

442. Voir, *supra*, par. 321.

443. Voir, *supra*, Première partie, par. 71.

444. Le Solliciteur général Robert Kaplan a manifesté le désir d'imposer de meilleures garanties mais au moment où nous achevons la rédaction de ce document il n'avait mis de l'avant aucune proposition précise. Voir "Kaplan Pushing to Renovate RCMP Search and Seizure Power", *Globe & Mail*, le 30 octobre 1981.

445. Ces propositions étaient contenues dans un communiqué de presse émis par le ministre de la Justice le 6 avril 1978. Voir aussi "Ottawa Retreats from its Intention to Abolish Long-running Search Writs", *Globe & Mail*, le 14 mars 1978.

446. *Re Writs of Assistance*, [1965] 2 R.C. de l'E. 645.

447. Voir *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, le 26 novembre 1981, p. 56:38, pour la déclaration du Solliciteur général Robert Kaplan à ce sujet.

448. Voir note 97, *supra*. Alors que 80 pour cent des mandats constatés au cours de notre enquête ont abouti à une saisie, dans 63 pour cent des cas l'objet saisi était celui mentionné par l'agent dans les motifs qu'il avait allégués pour procéder à la perquisition. Pour les mandats délivrés en vertu de la *Loi sur les stupéfiants* et de la *Loi des aliments et drogues*, les pourcentages étaient plus élevés, soit 94 pour cent et 71 pour cent.

449. *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, le 26 novembre 1981, p. 56:25. Voir aussi le Rapport Ouimet, *supra*, note 122, p. 69-72.

450. Voir, *supra*, Première partie, par. 210.

451. Voir note 163, *supra*.

452. Voir, *supra*, par. 211-219.

453. Rapport Ouimet, *supra*, note 122, p. 65-67.

454. Une infraction de possession a été constatée dans 29 pour cent des 165 cas où l'on a eu recours à un mandat et une infraction de trafic (y compris de possession en vue d'un trafic) dans 28,5 pour cent des cas. Dans presque la moitié des infractions de possession, il est fait mention qu'on cherchait de l'héroïne.

455. *Criminal Investigation*, *supra*, note 24, p. 92.

456. Bill C-53, 1980-81, art. 11. [Note de l'éditeur: Voir S.C. 1980-81-82, chap. 125, art. 12].

457. Mais voir *R.* v. *Foster; Ex parte Royal Canadian Legion Branch 177*, [1964] 3 C.C.C. 82 (C.S. C.-B.).

458. Voir, *supra*, Première partie, par. 145-146.

459. Foster, *supra*, note 457.

460. Des perquisitions de maisons de débauche ou de jeu dont il est fait rapport dans notre enquête sur les mandats, 125 ont été effectuées avec des mandats décernés en vertu de l'article 443 et 82 avec des mandats délivrés en vertu de l'article 181. Cette proportion résulte surtout de la situation constatée à Montréal où les chiffres pertinents étaient de 109 et de 55 respectivement. À Toronto et à Edmonton, les mandats de perquisition des maisons de débauche et de jeu avaient aussi été délivrés en vertu, pour les uns, de l'article 443 et, pour les autres, de l'article 181. Voir la note relative à notre enquête, *supra*, Première partie, note 262.

461. *Re Sommerville's Prohibition Application* (1962), 38 W.W.R. 344 (B.R. Sask.), p. 351.

462. *Rockert* c. *La Reine*, [1978] 2 R.C.S. 704.

463. Commission de réforme du droit du Canada, *Notre droit pénal*, *supra*, note 49, p. 36.

464. Voir, *supra*, par. 97-100.

465. Voir, *supra*, Première partie, par. 178-180.

466. Commission de réforme du droit du Canada, Document de travail n° 19, *Le vol et la fraude*, Ottawa, Ministre des Approvisionnements et des Services, 1977, p. 66-67.

467. Voir, par exemple, Ontario Police College, *Search and Seizure Précis* (mai 1976), p. 27.

468. Statistiques fournies par le Centre canadien des statistiques judiciaires.

469. *Ibid*.

470. Voir, par exemple, *The Prevention of Cruelty to Animals Act*, R.S.B.C. 1979, chap. 335.

471. Voir note 467, *supra*.

472. Voir note 55, *supra*.

473. Dans le but de procéder à une étude-pilote des pratiques en matière de perquisiton sans mandat, la Commission de réforme du droit a effectué un enquête dans une division du centre-ville de Toronto. Durant une période de dix jours, les agents ont fait eux-mêmes rapport de leurs perquisitions sans mandat. Ils ont durant cette période fait rapport de la fouille de 371 personnes et de 73 véhicules et

dans 19,4 pour cent et 35,6 pour cent respectivement des cas, l'objet de leur recherche comportait notamment des drogues.

474. *Misuse of Drugs Act*, 1971, par. 23(3) (R.-U.).

475. *RCCP Report*, *supra*, note 17, p. 33.

476. *Payton* v. *New York*, *supra*, note 438, p. 586-587.

477. *Criminal Investigation Bill, 1981*, *supra*, note 24, par. 60(1), et Commission de réforme du droit de l'Australie, *Criminal Investigation*, *supra*, note 24, p. 96.

478. *Misuse of Drugs Act*, 1975, (Commonwealth, No. 112) par. 18(2).

479. Voir, *supra*, par. 147-150.

480. Voir, *supra*, Première partie, par. 159.

481. *Ybarra* v. *Illinois*, *supra*, note 325.

482. *Pringle Report*, *supra*, note 210, p. 70.

483. Voir note 55, *supra*. Les saisies d'objets «bien en vue» ont représenté 47,3 pour cent des saisies de marijuana et 10 pour cent des saisies de produits chimiques. Les chiffres correspondants pour les objets dans les «armoires, les tiroirs, les cartons, etc.» étaient de 47,4 pour cent et 43,6 pour cent.

484. S.C. 1960-61, chap. 35, art. 10; S.C. 1960-61, chap. 37, art. 1

485. Voir, *supra*, par. 244-249.

486. Voir, *supra*, Première partie, par. 139. Si les pouvoirs de perquisition et de saisie étaient retranchés de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, l'arrêt *Goodbaum*, *supra*, note 221, ne s'appliquerait probablement plus et les règles générales du *Code criminel*, S.R.C. 1970, chap. C-34, régiraient les perquisitions en matière de stupéfiants.

487. Voir, *supra*, par. 50.

488. Voir, *supra*, par. 42-44.

489. Voir, par exemple, *R.* v. *Penthouse Magazine* (1977), 37 C.C.C. (2d) 376 (C. comté Ont.).

490. *R.* v. *Pipeline News* (1971), 5 C.C.C. (2d) 71 (C. dist. Alb.).

491. Dans *R.* v. *Penthouse International Ltd* (1979), 23 O.R. (2d) 786, par exemple, la Cour d'appel de l'Ontario a rendu sa décision 18 mois après la saisie.

492. Voir le document d'étude sur *L'obscénité* de la Commission de réforme du droit du Canada (décembre 1972), p. 90. Aux pages 166-69 figurent les tableaux des réponses à une enquête sur les pratiques

policières locales. Il n'y a qu'à Ottawa, où l'on a fait rapport de 248 mandats délivrés aux termes de l'article 160, que le recours à ces mandats peut être qualifié de fréquent. Par contre, à Montréal, les rapports n'indiquent qu'un seul mandat délivré en 1971-72, tandis qu'il y a eu 222 poursuites pour infraction à l'article 159.

493. *Nova Scotia Board of Censors* v. *McNeil*, [1978] 2 R.C.S. 662, p. 691.

494. Ce point de vue peut toutefois être sujet à certaines restrictions. Comme le soulignait le juge en chef Laskin dans sa dissidence, p. 682, en mettant l'accent sur la forme de l'interdiction plutôt que sur le fond, on invite la législature à chercher à faire par une interdiction préalable, ce qu'elle ne peut pas faire en définissant une infraction et en fixant la sanction *a posteriori*. De la même façon, le simple fait qu'une loi traite d'une question qui constitutionnellement pourrait relever du droit criminel, ne signifie pas que la loi elle-même constitue une loi pénale.

495. Voir, par exemple, Mark M. Krotter, "The Censorship of Obscenity in British Columbia: Opinion and Practice" (1970), 5 *U.B.C. L. Rev.* 123.

496. W.A. McKean "The War Against Indecent Publications" (1965), 1 *Otago L. Rev.* 75.

497. 18 U.S.C. 1465.

498. *Tarif des douanes*, S.R.C. 1970, chap. C-41, art. 14. Les «Livres, imprimés... ou reproductions de tout genre, de nature à fomenter la trahison ou la sédition, ou ayant un caractère immoral ou obscène» sont interdits aux termes de l'annexe C, no 99201-1.

499. Voir, *supra*, par. 65-69.

500. Voir, *supra*, Première partie, par. 176.

501. Martin L. Friedland, "Gun Control: The Options" 18 *Crim. L.Q.* 29 (1975-76) p. 36. Cet article donne l'historique de la législation canadienne sur les armes à feu.

502. Voir le mémoire présenté par le Comité national de police pour la protection des citoyens et publié en appendice aux *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, 1ere session, 30e Parlement (le 4 mai 1976), p. 43:197.

503. *Code criminel*, S.R.C. 1970, chap. C-34, art. 84-87.

504. *Code criminel*, S.R.C. 1970, chap. C-34, art. 88-89.

505. *Premier rapport provisoire*, *supra*, note 192, p. 124.

506. Voir, *supra*, par. 46-50.

507. Friedland, *supra*, note 501, p. 40-46.

508. *Loi sur les explosifs*, S.R.C. 1970, chap. E-15.

509. *Re Thomson*, *supra*, note 73.

510. *Ibid.*, p. 15-16.

511. *Attorney General of Canada* v. *Metcalfe*; *Attorney General of Canada* v. *Pattison* (1981), 59 C.C.C. (2d) 138 (C.A. Alb).

512. Metropolitan Toronto Police, *Search of Persons and Premises* (mars 1978), p. 4.

513. *Ibid.*, p. 2. Alors que ces directives du Service de police de la région métropolitaine de Toronto donnent une interprétation restrictive de l'article 101, les directives d'autres corps policiers ne font souvent que citer l'article, avec les ambiguïtés qu'il comporte. Dans le rapport provisoire rédigé pour le Solliciteur général, *supra*, note 192, il est mentionné que les recherchistes ont constaté que «dans une ou deux régions, le paragraphe 101(2) a permis de faciliter les perquisitions dans le cas de ‹criminels› notoires ou présumés». (p. 124 du *Rapport*).

514. Voir en particulier les recommandations 2, 7, 8, 9 et 46.

515. Voir, Première partie, *supra*, par. 129-130.

516. Un défenseur éminent des «contrôles internes» est le professeur David Bayley de l'Université de Denver, dont la communication "American, Japanese and Western European Systems of Accountability over the Police", encore inédite, a été présentée à la "International Conference on Police Accountability" tenue à l'Université de Colombie-Britannique, le 30 janvier 1980. Voir aussi: Bayley, "The Limits of Police Reform" dans D. Bayley, éd., "Police and Society", Beverley Hills, Sage Publications, 1977, p. 219.

517. Voir, *supra*, Première partie, par. 226.

518. En plus de contester après le fait une perquisition jugée illégale, on peut tenter de l'empêcher soit en s'y opposant par la force physique soit par voie d'injonction: *Solloway Mills & Co.* v. *Attorney General of Alberta* (1930), 53 C.C.C. 306 (C.A. C.-B.). Dans le premier cas, la solution est à la fois physiquement et légalement dangereuse alors que l'efficacité de la seconde solution est limitée puisque les agents de la paix peuvent toujours procéder à une nouvelle perquisition s'ils obtiennent subséquemment l'autorisation nécessaire.

519. Voir, *supra*, Première partie, par. 97-100.

520. Voir, par exemple, "Charges of Mayhem on the Beat", *MacLeans*, le 15 mars 1982, p. 51.

521. *R.* c. *Coutellier, Cobb et Cormier* (jugement inédit de la Cour des sessions du Québec, en date du 16 juin 1977).

522. Weiler, *supra*, note 35, p. 443-44.

523. James Spiotto, "The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule", [1973] 1 *J.P.S.A.A.* 36, p. 47.

524. Les recherchistes de la Commission ont obtenu les renseignements concernant toutes les poursuites civiles ou pénales intentées contre des membres de la G.R.C. en consultant les dossiers centraux mêmes de la G.R.C. Seules les actions mettant en cause la légalité des actes des agents ont été considérées. Ainsi, les actions civiles comportant, par exemple, une réclamation pour des dommages, soit causés durant l'exécution d'une perquisition soit résultant de la détention des biens saisis, on été omises de l'étude si la légalité des actes des agents de la G.R.C. était admise ou n'était pas mise en question. L'étude a embrassé toutes les contestations qui ont abouti à l'ouverture d'un dossier à la direction générale de la G.R.C., au cours des années 1978 et 1979.

525. *R.* v. *Ella Paint* (1917), 28 C.C.C. 171 (C.A. N.-É.).

526. *Coutellier, Cobb et Cormier*, *supra*, note 521.

527. Pour un excellent commentaire sur la procédure relative au dépôt des plaintes, voir Goldstein, *supra*, note 11, p. 157-186.

528. La G.R.C. ne garde pas à la direction générale les dossiers pour les plaintes portées contre ses agents si ces plaintes n'entraînent pas de poursuites civiles ou pénales. Toutefois, sa propre sous-direction des affaires internes a affectué au cours de l'hiver 1980 une étude sur les plaintes faites, à l'échelle du pays, contre les agents de la G.R.C. L'étude a porté sur une période de six mois au cours de laquelle 1 042 plaintes avaient été reçues. Parmi celles-ci, 26 avaient trait à des perquisitions et 18 à des saisies. Les résultats de l'étude transmis à la Commission ne font pas la distinction entre les perquisitions effectuées avec ou sans mandat ou avec des mandats de main-forte.

529. Spiotto, *supra*, note 523, p. 47.

530. *Rapport de la Commission d'enquête sur les plaintes du public, la discipline interne et le règlement des griefs au sein de la Gendarmerie royale du Canada*, Ottawa, Information Canada, 1976, p. 54-55.

531. Voir, par exemple, Herman Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority" (1967), 58 *Jour. of Crim. Law., Crimin. and Pol. Sc.* 160, p. 167-168.

532. *Cave* v. *Mountain* (1840), 1 Man. & C. 257; 133 E.R. 330 (C.P.).

533. *Re Alder and The Queen* (1978), 37 C.C.C. (2d) 234 (C.S. Alb.), p. 252.

534. *Den Hoy Gin*, *supra*, note 215.

535. *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, [1964] 3 C.C.C. 381, p. 386-387.

536. Par exemple, voir le *Public Authorities Protection Act*, (Loi sur l'immunité accordée à certaines personnes) R.S.O. 1980, chap. 406, art. 3; *The Justices and Magistrates Protection Act*, R.S.N.S. 1967, chap. 157, art. 2 et 3 et *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, chap. 189, art. 4 et 5.

537. Voir *The Provincial Court Act*, R.S.B.C. 1979, chap. 341, art. 37; *The Provincial Court Act*, S.A. 1971, chap. 86, par. 15(3); et *The Provincial Judges Act*, (Loi sur les juges provinciaux) S.M. 1972, chap. 61, art. 12.

538. Weiler, *supra*, note 35, p. 445.

539. *Ibid.*, p. 448.

540. Voir, *supra*, note 524.

541. Spiotto, *supra*, note 523, p. 45.

542. *Ibid.*

543. *Ibid.*

544. Weiler, *supra*, note 35, p. 449.

545. Un ouvrage récent sur le sujet est celui de Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada*, *supra*, note 146. Voir aussi Ericson, *supra*, note 10, p. 138.

546. [1971] R.C.S. 272, par le juge Martland, p. 293. Cette prise de position a été incorporée dans l'article 22 de la *Loi sur la preuve du Canada 1982* (Projet de loi S-33); il a été déposé au Sénat et adopté en première lecture le 18 novembre 1982.

547. *R.* v. *Kehr* (1906), 11 O.L.R. 517 (C. Div. Ont.).

548. *Bergeron* c. *Deschamps*, [1978] 1 R.C.S. 243; (1977) 33 C.C.C. (2d) 461.

549. *Re Black and The Queen* (1973), 13 C.C.C. (2d) 446 (C.S. C.-B.).

550. *Re Alder and The Queen*, *supra*, note 533, p. 251.

551. *Model Power (A Division of Master Miniatures Ltd.)* c. *La Reine*, jugement inédit du 1er oct. 1979 par la Haute cour de l'Ontario et confirmé par la Cour d'appel de l'Ontario le 25 janvier 1980; l'autorisation d'appel à la Cour suprême a été refusée le 11 mars 1980. *Re Atkinson and The Queen* (1978), 41 C.C.C. (2d) 435 (C.S. N.-B.), *Re Barton* (1979), 60 A.P.R. 631 (B.R. N.-B.), *R.* c. *Pomerleau* (jugement inédit de la Cour d'appel du Québec, en date du 14 février 1979).

552. *Capostinsky* v. *Olsen*, jugement inédit de la Cour suprême de la Colombie-Britannique, le 3 avril 1981.

553. *Re Butler and Butler and Solicitor General* (1981), 61 C.C.C. (2d) 512 (C.S. C.-B.).

554. *Re Black and The Queen*, *supra*, note 549.

555. Voir, par exemple, *Elkins* v. *United States* (1964), 364 U.S. 206, p. 217.

556. Voir, par exemple, *Stone* v. *Powell*, (1976) 428 U.S. 465, p. 482 (par le juge Powell) et 498 (par le juge en chef Burger).

557. Voir, par exemple, J. David Hirschel, *Fourth Amendment Rights*, Lexington, D.C. Heath, 1979.

558. Goldstein, *supra*, note 531, p. 171-172.

559. *Le procureur général de la Nouvelle-Écosse* c. *MacIntyre*, *supra*, note 12.

560. *Laycraft Inquiry*, *supra*, note 238.

561. *Pringle Report*, *supra*, note 210.

562. Voir notes 399 et 400, *supra*.

563. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Police*, Washington, U.S. Government Printing Office, 1967, p. 34.

564. *Premier rapport provisoire*, *supra*, note 192.

565. *Ibid.*, p. 131.

566. *Loi constitutionnelle de 1867*, 30 & 31 Vict., chap. 3, par. 92(14).

TROISIÈME PARTIE:

SOMMAIRE

DES

RECOMMANDATIONS

Choses, fonds et renseignements

1.Compte tenu des techniques modernes d'obtention et de conservation des choses et des renseignements, il devrait être clairement énoncé que la saisie comprend notamment:

a) le fait de photographier une chose «saisissable»;

b) l'obtention de dossiers «saisissables», quelles que soient leur forme matérielle ou la façon dont ils sont conservés; et

c) le blocage de fonds «saisissables» dans les registres comptables.

Les choses saisissables

2.Devraient être reconnus comme «saisissables» les choses, fonds ou renseignements:

a) qui constituent les produits d'une infraction;

b) qui constituent la preuve de la perpétration d'une infraction; ou

c) dont la possession, dans les circonstances de l'espèce, constitue une infraction.

Le terme «produits d'une infraction» désigne un bien volé ou enlevé illégalement à la victime de l'infraction. Il inclut le bien qui a été acquis par l'échange ou la conversion du bien qui était initialement en possession de l'accusé.

Les personnes illégalement détenues

3. Outre leurs pouvoirs concernant les choses «saisissables», les agents de la paix devraient être habilités à effectuer des perquisitions en vue de délivrer des personnes détenues dans des circonstances constituant une infraction.

Les exceptions à l'exigence générale du mandat

4. Sauf indication contraire, l'agent de la paix ne devrait être habilité à procéder à une fouille, à une perquisition ou à une saisie

visant des choses «saisissables» qu'avec un mandat. Cependant, un mandat ne devrait pas être requis:

a) lors d'une fouille ou d'une perquisition effectuée avec le consentement de la personne concernée, conformément aux recommandations 5 et 6;

b) lors d'une fouille, d'une perquisition ou d'une saisie concomitante d'une arrestation, conformément aux recommandations 7 et 8;

c) lors d'une fouille, d'une perquisition ou d'une saisie effectuée dans des circonstances présentant un danger pour la vie humaine ou la sécurité, conformément à la recommandation 9;

d) lors d'une perquisition effectuée dans un véhicule automobile, dans des circonstances où une chose «saisissable» peut être perdue ou détruite, conformément à la recommandation 10; et

e) lors de la saisie d'une chose «saisissable» bien en vue, conformément à la recommandation 30.

Le consentement

5. L'agent de la paix devrait être autorisé à fouiller sans mandat:

a) toute personne qui consent à être fouillée, et

b) tout endroit ou véhicule, avec le consentement d'une personne présente qui a manifestement qualité pour consentir à la perquisition.

L'agent de la paix devrait être habilité à saisir toute chose «saisissable» découverte au cours d'une fouille ou d'une perquisition de consentement.

6. Le consentement devrait être consigné sur un document informant la personne de son droit de refuser de se soumettre à la fouille ou à la perquisition, et de révoquer son consentement en tout temps. L'absence d'un document dûment rempli devrait constituer une preuve suffisante à première vue de l'absence de consentement.

L'arrestation

7. L'agent de la paix devrait être habilité à fouiller une personne qui a été arrêtée si cette fouille constitue une précaution raisonnable dans les circonstances. La portée de ce pouvoir devrait également

s'étendre aux endroits qui sont à la portée de la personne arrêtée au moment de la fouille.

8. Outre les choses «saisissables», l'agent de la paix qui arrête une personne devrait être habilité à saisir:

a) tout ce qui est nécessaire à l'identification de la personne arrêtée; et

b) toute arme ou autre objet qui pourrait permettre à la personne arrêtée de s'échapper ou de mettre en danger la vie ou la sécurité de l'agent de la paix ou d'une tierce personne, ou encore sa propre vie ou sa propre sécurité.

Les cas où le délai mettrait en péril la vie humaine ou la sécurité du public

9. Lorsqu'un agent de la paix croit pour des motifs raisonnables:

a) qu'une chose «saisissable» se trouve en possession d'une personne ou dans un endroit ou un véhicule, et

b) que le délai nécessaire à l'obtention d'un mandat aurait pour effet de mettre en péril la vie humaine ou la sécurité,

il devrait être habilité à fouiller cette personne, cet endroit ou ce véhicule, et à saisir sans mandat ces choses «saisissables».

Les fouilles de véhicules lorsque le délai est susceptible d'entrainer la perte ou la destruction de choses saisissables

10. Lorsqu'un agent de la paix arrête une personne qui a le contrôle d'un véhicule ou qui occupe celui-ci, et croit pour des motifs raisonnables:

a) qu'une chose «saisissable» se trouve dans le véhicule; et

b) que le délai nécessaire à l'obtention d'un mandat est susceptible d'entrainer la perte ou la destruction de la chose «saisissable»,

il devrait être habilité à fouiller le véhicule et à saisir sans mandat la chose «saisissable».

La délivrance des mandats

11. Le juge de paix devrait être habilité à délivrer un mandat autorisant la fouille d'une personne, d'un lieu ou d'un véhicule s'il existe des motifs raisonnables de croire que cette personne porte ou dissimule sur elle une chose saisissable, ou qu'une telle chose se trouve ou est dissimulée dans ce lieu ou ce véhicule.

12. Sauf dans le cas du télémandat prévu à la recommandation 19, toute demande de mandat de perquisition devrait être présentée sous la forme d'une dénonciation écrite sous serment. La personne chargée de délivrer le mandat devrait être habilitée à interroger le requérant afin d'obtenir des renseignements supplémentaires sur la demande. Si la décision est fondée sur ces renseignements supplémentaires, ceux-ci devraient être consignés et certifiés dans la dénonciation.

Les documents

13. Des formules types devraient être établies afin de supprimer les problèmes découlant à l'heure actuelle de l'improvisation dans la rédaction. Contrairement à la formule 1 actuelle, ces formules devraient aider l'agent à formuler tous les détails exigés par la loi. Elles devraient être rédigées dans une langue compréhensible et le jargon juridique devrait être évité. Les principes directeurs utilisés par la police devraient mettre en évidence le soin qu'il y a lieu d'apporter à la rédaction de la dénonciation et du mandat, plutôt qu'à celle des documents de nature purement administrative.

Le pouvoir discrétionnaire du juge de paix et le refus de délivrer le mandat

14. L'agent de la paix qui présente une demande de mandat devrait être tenu de divulguer dans la dénonciation toute demande antérieure visant l'obtention d'un mandat identique (par exemple: un mandat autorisant la fouille de la même personne, du même endroit ou du même véhicule, afin de découvrir des objets saisissables liés au même acte ou à un acte connexe).

Le critère applicable

15. L'agent de la paix qui demande la délivrance d'un mandat ne devrait pas être tenu de divulguer des faits pouvant révéler l'identité de sources confidentielles. Cependant, ce principe ne devrait pas avoir pour conséquence de permettre la délivrance d'un mandat fondé sur une demande qui ne satisfait pas au critère général des «motifs raisonnables».

16. L'article 178.2 du *Code criminel* devrait être modifié de façon à énoncer qu'il n'est pas interdit aux agents de la paix de révéler, lors d'une demande de mandat de perquisition, des faits dont ils ont eu connaissance grâce à l'écoute téléphonique.

La personne chargée de la délivrance des mandats

17. Le pouvoir du juge de paix de délivrer des mandats de perquisition ne devrait pas être dissocié de ses autres fonctions judiciaires. Il importe de s'assurer de la compétence et de l'indépendance des personnes habilitées par le *Code criminel* à exercer des pouvoirs judiciaires importants. Les provinces devraient prendre l'initiative de réexaminer la charge de juge de paix et, au besoin, soit l'abolir, soit la redéfinir.

Le rôle du procureur de la Couronne

18. Une participation accrue des procureurs de la Couronne et des avocats mandatés par les forces de police pourrait améliorer la qualité des demandes de mandats. Toutefois, cette participation de la Couronne devrait rester discrétionnaire. Les personnes chargées de la délivrance des mandats devraient se sentir libres de requérir la participation de la Couronne. En outre, le rôle de la Couronne devrait être celui d'une partie qui expose ses prétentions et non celui d'un conseiller juridique auprès du juge de paix.

Le télémandat

19. Un mécanisme de télémandat semblable à celui que prévoient les "American Federal Rules" devrait être institué au Canada. Un télémandat ne devrait pouvoir être obtenu que s'il existe des motifs justifiant la délivrance d'un mandat ordinaire aux termes de la

recommandation 11, mais que le recours aux mécanismes habituels soit matériellement impossible. Ce mécanisme devrait comporter des garanties permettant à la personne visée d'avoir par la suite accès au dossier, et assurant que le mandat exécuté par l'agent de la paix est identique à celui qu'a autorisé le juge de paix.

L'exécution des mandats

20. Le simple citoyen devrait continuer d'être en droit de demander la délivrance d'un mandat de perquisition. Cependant, une fois la perquisition autorisée par celui qui est chargé de la délivrance du mandat, la police devrait avoir l'entière responsabilité de l'exécution du mandat. L'agent de la paix devrait être habilité à emmener à l'endroit ou au véhicule où a lieu la perquisition tout citoyen, s'il croit pour des motifs raisonnables que la présence de celui-ci est nécessaire à la bonne exécution du mandat.

L'agent de la paix compétent

21. Tout agent de la paix se trouvant dans le ressort de la personne qui a délivré le mandat devrait être habilité à exécuter le mandat.

L'exécution de jour ou de nuit

22. Le mandat ne devrait pouvoir être exécuté que pendant le jour, à moins que celui qui en fait la demande n'en justifie l'exécution de nuit.

La date limite d'exécution

23. Le mandat ne devrait être exécutoire que pendant huit jours. L'agent de la paix devrait toutefois être en droit de demander la délivrance d'un nouveau mandat si les motifs justifiant la perquisition existent toujours à l'expiration du terme.

La portée des fouilles, des perquisitions et des saisies avec mandat

24. L'agent de la paix exécutant un mandat de perquisition ne devrait être habilité à fouiller, dans les lieux ou les véhicules spécifiés dans le mandat, ou sur les personnes nommées dans le mandat, que les endroits où il est raisonnable de croire que les objets spécifiés dans le mandat sont susceptibles de se trouver. Outre les choses «saisissables» spécifiées dans le mandat, l'agent de la paix exécutant une telle fouille ou perquisition devrait être habilité à saisir toute autre chose «saisissable» se trouvant bien en vue.

L'emploi de la force

25. L'emploi de la force devrait continuer d'être régi de façon générale par les critères actuellement énoncés au paragraphe 25(1) du *Code criminel*, aux termes duquel l'agent de la paix qui agit en s'appuyant sur des motifs raisonnables et probables est fondé à employer la force nécessaire.

L'entrée sans préavis

26. En l'absence de circonstances justifiant l'entrée sans préavis ou par la force dans un lieu privé, l'agent de la paix devrait être tenu de demander la permission avant d'entrer. Si l'occupant n'obtempère pas dans un délai raisonnable, l'agent devrait alors avoir le pouvoir d'employer la force.

Les obligations envers la personne visée par la fouille, la perquisition ou la saisie

27. Lorsqu'un agent de la paix effectue une fouille, une perquisition ou une saisie en vertu d'un mandat, il devrait être tenu, avant d'entreprendre la fouille ou la perquisition, ou dès que possible par la suite, de remettre une copie du mandat à la personne visée ou à une autre personne présente qui a manifestement la responsabilité du lieu ou du véhicule devant être fouillé. Si le lieu ou le véhicule est inoccupé lors de la perquisition ou de la saisie, une copie du mandat devrait y être affichée de façon convenable.

28. Lorsque cela est possible, une personne présente qui a manifestement la responsabilité du lieu ou du véhicule fouillé devrait être autorisée à assister à la fouille.

29. Si des choses sont saisies au cours d'une perquisition, la personne visée devrait être en droit de recevoir, sur demande, une copie du procès-verbal de saisie. Si, à la connaissance de l'agent, les choses saisies appartiennent à une autre personne que celle qui est fouillée ou qui est propriétaire du lieu ou du véhicule fouillé, une copie du procès-verbal devrait également être fournie au propriétaire, sans que celui-ci soit tenu de la demander. Le procès-verbal devrait contenir tous les détails qui peuvent raisonnablement être donnés dans les circonstances.

La doctrine des objets «bien en vue»

30. Lorsque, en effectuant une perquisition légale, ou se trouvant légalement dans un lieu, l'agent de la paix découvre des «choses saisissables se trouvant bien en vue», il devrait être habilité à les saisir sans mandat. Le cas échéant, un rapport postérieur à la perquisition et rédigé conformément à la recommandation 37 devrait être produit.

Les fouilles de personnes

31. Un agent de la paix peut fouiller une personne

a) désignée dans un mandat de perquisition;

b) trouvée dans un endroit ou un véhicule spécifié dans un mandat de perquisition

(i) s'il a des motifs raisonnables de croire qu'elle porte une chose saisissable spécifiée dans le mandat, et

(ii) si la personne qui a délivré le mandat a autorisé expressément, sur celui-ci, la fouille des personnes trouvées dans l'endroit ou dans le véhicule spécifié; ou

c) en vertu des pouvoirs de fouille et de perquisition sans mandat établis aux recommandations 5 à 10.

Toutefois, un «examen médical» ou une fouille de la bouche ne peuvent être exécutés qu'en conformité des recommandations 32 et 33.

32. Les règles de droit concernant les fouilles, les perquisitions et les saisies ne devraient autoriser aucun acte nécessitant la perforation

de la peau humaine. L'«examen médical» (par exemple, la fouille comportant des touchers sexuels intimes, ou l'examen du corps nu ou des orifices corporels, qui ne nécessitent pas la perforation de la peau) ne devrait être autorisé:

a) que relativement à une infraction grave définie par le Parlement;

b) qu'en vertu d'un mandat spécifique désignant la personne qui doit faire l'objet de l'examen;

c) que s'il est effectué par un médecin qualifié; et

d) que s'il est effectué dans le respect de l'intimité de la personne examinée.

33. La fouille de la bouche d'une personne ne devrait être autorisée:

a) que relativement à une infraction grave définie par le Parlement;

b) que si elle est effectuée de façon à ne pas mettre en danger la vie humaine ou la sécurité; et

c) qu'à la condition que l'agent de la paix qui effectue la fouille dresse ensuite un rapport, conformément à la recommandation 37.

Les fouilles et les perquisitions avec mandat

34. La personne qui délivre un mandat de perquisition devrait avoir le pouvoir d'exclure certaines personnes lors de l'audition de la demande de mandat, s'il lui apparaît que les fins de la justice seront mieux servies ainsi.

35. La personne soumise à une fouille, à une perquisition ou à une saisie devrait pouvoir examiner le mandat et la dénonciation sous serment immédiatement après l'exécution du mandat. Toute autre personne devrait également avoir accès à ces documents, mais ne devrait pas pouvoir en publier ni en diffuser le contenu jusqu'à ce que:

a) l'interdiction soit levée, à la demande de la personne visée, par un juge d'une cour supérieure, ou par un juge au sens des dispositions de l'article 482 du *Code criminel*,

b) la personne visée soit libérée à l'issue de l'enquête préliminaire, ou

c) le procès de la personne visée soit terminé.

36. Si la divulgation du contenu d'une dénonciation ou d'un mandat est susceptible de révéler l'existence d'un processus de surveillance électronique, la personne qui délivre le mandat devrait, à la demande de la Couronne ou d'un agent de la paix, avoir le pouvoir de garder secret tout numéro de téléphone mentionné dans le document, et d'y substituer un code. De même, si l'identité d'un informateur confidentiel risque d'être révélée, l'agent de la paix ou la personne qui délivre le mandat devrait avoir le pouvoir de garder secret le nom ou la désignation de l'informateur, et de les remplacer par un code. La personne qui délivre le mandat devrait alors certifier que les seuls renseignements ainsi cachés sont soit les chiffres d'un numéro de téléphone, soit le nom ou la désignation d'un informateur, selon le cas.

Les fouilles et les perquisitions sans mandat

37. L'agent de la paix devrait être tenu de remplir un rapport postérieur à la fouille ou à la perquisition dans les cas suivants:

a) lorsque des choses ont été saisies sans mandat,

b) lorsque des choses non spécifiées dans le mandat ont été saisies lors d'une perquisition autorisée par un mandat, conformément à la recommandation 24,

c) lorsqu'une fouille buccale est effectuée, conformément à la recommandation 33.

Le rapport devrait faire état de l'heure et du lieu de la fouille, de la perquisition ou de la saisie, des motifs qui y ont donné lieu, ainsi que des choses saisies. Toute personne visée par la fouille, la perquisition ou la saisie devrait avoir accès à ce rapport sur demande.

La personne qui n'est pas soupçonnée

38. Lorsque la personne qui se trouve en possession de choses «saisissables» n'est pas soupçonnée d'avoir participé à la perpétration de l'infraction ayant donné lieu à la perquisition, l'agent de la paix qui exécute la perquisition devrait généralement être tenu de demander à cette personne de produire les choses en question. Toutefois, l'agent devrait avoir le pouvoir d'effectuer lui-même la perquisition:

a) si la personne refuse d'obtempérer dans un délai raisonnable; ou

b) s'il a des motifs raisonnables de croire qu'une telle demande peut entraîner la destruction ou la perte des choses en question.

Les comptes bancaires

39. Lorsqu'il existe des motifs raisonnables de croire que des choses «saisissables» ont été déposées dans un compte bancaire, la police devrait avoir le pouvoir d'obtenir un mandat en vue de transférer le montant des fonds saisissables dans un compte officiel de la police, placé sous le contrôle judiciaire. Lorsque les policiers saisissent des documents comptables dont ils croient raisonnablement qu'ils contiennent des renseignements leur permettant de demander un mandat pour la saisie de fonds se trouvant dans un compte bancaire, ils devraient pouvoir obtenir une ordonnance temporaire gelant la provision de ce compte. L'ordonnance de gel devrait avoir un effet limité dans le temps et sa portée devrait être restreinte à la somme des fonds saisissables. Le pouvoir de rendre une telle ordonnance devrait appartenir à un juge d'une cour supérieure ou à un juge mentionné à l'article 482 du *Code criminel*, et la personne visée par l'ordonnance devrait avoir le droit d'en demander la révocation immédiatement.

Le secret professionnel de l'avocat

40. Il convient d'adopter les règles prévues au Projet de loi C-21, présenté en 1978, portant sur la mise sous scellé des documents à caractère confidentiel. Deux nouvelles dispositions devraient cependant être ajoutées. En premier lieu, la protection du secret devrait s'étendre aussi bien aux documents en possession du client qu'à ceux qui sont en possession de l'avocat. En second lieu, il devrait être prévu expressément que le requérant et le procureur de la Couronne ont tous deux accès aux documents qui font l'objet de la demande.

Les perquisitions dans les locaux de la presse et des autres media

41. La presse ne devrait bénéficier, à l'encontre des fouilles, des perquisitions et des saisies abusives, d'aucune mesure de protection particulière en dehors de celles qui sont prévues par la *Charte* et par les présentes recommandations.

L'entrée clandestine

42. La modification des règles relatives aux fouilles, aux perquisitions et aux saisies, afin de permettre les activités clandestines

de la police constituerait une atteinte grave aux mécanismes de protection que ces règles comportent. En l'absence de preuve établissant de façon convaincante la nécessité de tels sacrifices, les règles de procédure relatives aux enquêtes en matière criminelle ou en matière connexe ne devraient pas être modifiées.

Le mandat de main-forte

43. Le mandat de main-forte prévu par la *Loi sur les stupéfiants*, la *Loi des aliments et drogues*, la *Loi sur les douanes* et la *Loi sur l'accise* devrait être aboli.

Les autres pouvoirs spéciaux

44. Les dispositions particulières suivantes devraient être abrogées:

a) l'article 181 du *Code criminel*, portant sur les pouvoirs relatifs aux maisons de débauche et aux maisons de jeu,

b) l'article 182 du *Code criminel*, portant sur le mandat permettant de rechercher des femmes dans des maisons de débauche,

c) l'article 183 du *Code criminel*, portant sur l'interrogatoire de personnes trouvées dans des maisons de débauche,

d) l'article 353 du *Code criminel*, relatif au mandat en matière de métaux précieux,

e) le paragraphe 299(3) du *Code criminel*, portant sur la recherche de bois volé,

f) l'article 403 du *Code criminel*, portant sur la saisie de coqs dans une arène,

g) l'article 420 du *Code criminel*, portant sur la saisie de monnaie contrefaite,

h) l'article 10 de la *Loi sur les stupéfiants* et l'article 37 de la *Loi des aliments et drogues*, portant sur les pouvoirs de fouille, de perquisition et de saisie en matière de stupéfiants et de drogues.

Les publications obscènes, les histoires illustrées de crimes et la propagande haineuse

45. Les dispositions prévoyant des mandats spéciaux en matière de publications obscènes, d'histoires illustrées de crimes et de propagande haineuse devraient être considérées comme des dispositions à caractère normatif et non comme des règles de procédure pénale. En conséquence, si ces dispositions doivent être conservées, elles devraient être retirées du *Code criminel* et reprises dans un texte réglementaire.

Les armes à feu

46. Le pouvoir de saisir des armes à feu, actuellement prévu aux articles 99 et 100 du *Code criminel*, est inclus dans les recommandations qui précèdent. Le mandat autorisant la saisie d'armes à feu en vertu de l'article 101 ne constitue pas un mécanisme utile pour l'application du droit pénal. Il peut cependant répondre à des objectifs légitimes dans le contexte de la réglementation de la possession d'armes à feu. Ce texte devrait donc être reformulé, afin

a) de relier plus étroitement les textes relatifs aux fouilles, aux perquisitions et aux saisies, et les dispositions sur la confiscation *in rem*, et

b) de n'autoriser les perquisitions que lorsque l'on est fondé à croire qu'une arme se trouve en possession, sous la garde ou sous le pouvoir de la personne visée.

L'application des règles

47. Un mécanisme devrait être établi afin de sanctionner le principe suivant lequel la preuve illégalement obtenue est irrecevable au procès, lorsque son utilisation est susceptible de déconsidérer l'administration de la justice. Les détails de ce mécanisme seront élaborés dans un document de travail portant sur les mécanismes postérieurs à la saisie.

48. Les autorités compétentes devraient envisager la possibilité d'établir, aux niveaux provincial et local, des comités de juges et d'avocats chargés de surveiller le respect des exigences légales concernant les documents relatifs au mandat de perquisition.

POOR

QUALITY

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